The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§101.700 - 101.718

The proposed new sections will be submitted to the U.S. Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rules

Federal Clean Air Act (FCAA), §182(d)(3) and (e) and §185 (Section 185, generally) require the SIP to include a rule that implements a penalty fee (Section 185 fee, Failure to Attain Fee, fee) for major stationary sources (major sources) of volatile organic compounds (VOC) located in an ozone nonattainment area classified as severe or extreme if that area fails to attain the ozone National Ambient Air Quality Standard (NAAQS or standard) by the applicable attainment date. FCAA, §182(f) states that requirements "for major stationary sources of volatile organic compounds shall also apply to major stationary sources (as defined in §7602 of this title and subsections (c), (d), and (e) of this section) of oxides of nitrogen (NO_x)." This FCAA requirement extends the Section 185 fee assessment to major stationary sources of NO_x emissions. The SIP must also include procedures for the assessment and collection of the penalty fee. If the state does not impose and collect the fee, then FCAA, §185(d) requires that EPA impose and collect the fee with interest, and the revenue is not returned to the state.

For the 2008 eight-hour ozone standard of 0.75 parts per million, on October 7, 2022, EPA published a final notice that reclassified the Dallas-Fort Worth (DFW) and Houston-Galveston-Brazoria (HGB) 2008 eight-hour ozone nonattainment areas from serious to severe effective November 7, 2022 (87 *Federal Register* (FR) 60926). The DFW severe nonattainment area consists of 10 counties: Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise. The HGB severe nonattainment area consists of eight counties: Brazoria,

Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller. The DFW and HGB severe nonattainment areas are required to attain the 2008 eight-hour ozone standard by July 20, 2027. If a severe or extreme ozone nonattainment area does not attain by the attainment date, the area will be subject to the penalty fee requirements upon EPA issuing a finding of failure to attain for the area. For fee assessment purposes, the 2027 calendar year from January 1, 2027, through December 31, 2027, is anticipated to be the baseline year for these severe nonattainment areas since it is the year that contains the attainment date. The penalty fee is required to be paid until EPA redesignates the area as attainment for the 2008 eight-hour ozone standard or EPA takes action that results in termination of the fee.

As stated in FCAA, §182(d)(3) and (e) and §185, the required penalty is $5,000 per ton, as adjusted for inflation by the consumer price index (CPI), of VOC and/or NO_x emissions emitted in excess of 80% of a major stationary source's baseline amount. A baseline amount would be determined for each pollutant, VOC and/or NO_x, for which the source meets the major source applicability requirements. A source that is major for VOC emissions would be subject to the fee on VOC emissions; a source that is major for NO_x emissions would be subject to the fee on NO_x emissions; and a source that is major for both VOC and NO_x emissions would be subject to the fee on both VOC and NO_x emissions.

The major stationary source's fixed baseline amount is proposed to be calculated as the lower of the baseline emissions or total annual authorized emissions during the baseline year; the baseline amount must be adjusted downward to account for unauthorized emissions and/or emissions limitations in effect as of December 31 of the baseline year or timeframe used to determine the baseline amount. The major stationary source's baseline emissions are defined as the annual routine emissions reported to the TCEQ point source emissions inventory (emissions inventory) according to 30 TAC §101.10, excluding emissions not authorized by permit or rule,

such as emissions from emissions events and scheduled or unscheduled maintenance, startup, and shutdown (MSS) activities. The major stationary source's authorized emissions include emissions allowed under any EPA or TCEQ-enforceable measure or document, such as rules, regulations, permits, orders of the commission, and/or court orders.

The proposed rule allows for a baseline amount determination with flexibilities such as aggregating pollutants (VOC and NO_x emissions) and aggregating sites under common ownership and control into a single baseline. The proposed rule also allows for baseline amount determinations when a period other than the baseline year may be required, such as new major stationary sources that began operating after the baseline year or major stationary sources with emissions that are irregular, cyclic, or vary significantly from year to year. Under specific circumstances, as proposed, major stationary sources may request adjustments to the fixed baseline amount. The estimated maximum Section 185 fee without baseline amount flexibilities and alternative revenue for both the HGB and DFW severe ozone nonattainment areas would be over $200 million per year.

TCEQ proposes a program under FCAA, §172(e) with flexibility aspects not directly described in FCAA, §185, including but not limited to alternative revenue and baseline aggregation. Although EPA has not issued guidance to assist states with developing Section 185 fee programs under the 2008 eight-hour ozone standard, in its 2010 guidance (available at: *http://www.epa.gov/glo/pdfs/20100105185guidance.pdf),* multiple approvals of similar equivalent alternative programs in California and New York, and in a final rule published in the February 14, 2020, *Federal Register* (85 FR 8411) for the Section 185 Fee Program in the HGB nonattainment area under the one-hour ozone standard (HGB Failure to Attain Fee), EPA approved the use of equivalent programs to fulfill the FCAA, §185 fee requirement. Although the 2010 guidance was vacated by the D.C. Circuit Court of Appeals on procedural grounds,

EPA continued to utilize the principles outlined in the guidance as support for its approvals of equivalent alternative programs, *NRDC v. EPA*, 643 F.3d 311 (D.C. Cir. July 2011). Notably, the court did not prohibit alternative programs, instead stating that "neither the statute nor our case law obviously precludes that alternative." In the absence of formal EPA guidance for Section 185 fee programs under the 2008 eight-hour ozone standard, this proposed rulemaking relied on the 2010 guidance to develop Texas' fee program. In the HGB Failure to Attain Fee final approval, EPA approved fee programs funded to reduce VOC and NO_x emissions that are qualified programs, surplus to the one-hour ozone SIP, and designed to result in direct reductions or facilitate future reductions of VOC or NO_x emissions, which is consistent with the principles of the anti-backsliding principle of the FCAA §172(e). EPA's 2010 guidance requires an equivalent alternative program to achieve the same emissions reductions, raise the same amount of revenue and establish a process by which penalty funds would be used to pay for emission reductions that would further improve ozone air quality, or a combination of emissions reductions or revenue collection.

EPA states in its 2010 guidance that it may allow alternative programs for which "the proceeds are spent to pay for emissions reductions of ozone-forming pollutants (NO_x and/or VOC) in the same geographic area subject to the §185 program." EPA further states, "Under this concept, states could develop programs that shift the fee burden from the specific set of major stationary sources that are otherwise required to pay fees according to §185, to other non-major sources of emissions, including owners/operators of mobile sources." From these statements and EPA's final approval of the HGB Failure to Attain Fee, located in 30 Texas Administrative Code (TAC) 101 Subchapter B, EPA supports equivalent alternative options to a fee-based program provided the option is "no-less stringent" than a strict fee-based program and generally meets the stated criteria for the (now revoked) one-hour ozone standard. EPA approved other equivalent alternative programs pursuant to the 2010 guidance for the one-

hour ozone standard including San Joaquin Valley (77 FR 50021), South Coast Air Quality Management District, (77 FR 74372), and the New York portion of the New York-Northern New Jersey-Long Island nonattainment area (84 FR 12511). EPA's approvals of these Section 185 fee programs under the one-hour ozone standard included alternative fee revenue by assessing a fee on mobile sources. The revenue was used to offset the fee due from major stationary sources in the nonattainment areas. EPA's prior approvals were based on its current interpretation that FCAA, §172(e) allows equivalent alternative fee programs for revoked ozone standards. However, nothing in FCAA, §172(e) prohibits equivalent alternative fee programs for active ozone standards and therefore the commission proposes an equivalent alternative fee program in this rule.

The HGB Failure to Attain Fee Rule allowed revenue collected from the HGB one-hour ozone standard nonattainment area for qualified programs that directly reduced VOC or NO_x emissions to offset the FCAA, §185 fee. No actual revenue or funding was transferred to the program; the funds were calculated, recorded, and assessed to ensure a sufficient amount was collected to offset the required Section 185 fee amount. The same approach is used for this proposed rulemaking.

Although EPA has not issued guidance to assist states with developing Section 185 fee programs under the 2008 eight-hour ozone standard, EPA originally described certain basic principles concerning the applicability of the FCAA, §182(d)(3) and (e) and §185 fee for severe or extreme ozone nonattainment areas under the one-hour ozone standard. In a final rule published November 16, 2005, in the *Federal Register* (70 FR 69440) regarding the Maryland portion of the Washington, D.C. severe one-hour ozone nonattainment area, EPA noted in response to a comment that "Section 185 of the Act simply requires that the SIP contain a provision that major stationary sources within a severe or extreme nonattainment area pay a

fee to the state as a penalty for failure of that area to attain the ozone NAAQS by the area's attainment date. This penalty fee is based on the tons of volatile organic compound or nitrogen oxide emitted above a source-specific trigger level during the 'attainment year.' It [the fee] first comes due for emissions during the calendar year beginning after the attainment date and must be paid annually until the area is redesignated to attainment of the ozone NAAQS. Thus, if a severe area, with an attainment date of November 15, 2005, fails to attain by that date, the first penalty assessment will be assessed in calendar year 2006 for emissions that exceed 80% of the source's 2005 baseline emissions" (70 FR 69440, 69441). The same rationale was used to establish the anticipated baseline year of 2027 for the DFW and HGB severe nonattainment areas under the 2008 eight-hour ozone standard.

EPA further states that a "penalty fee that is based on emissions could have some incidental effect on emissions if sources decrease their emissions to reduce the amount of the per ton monetary penalty. However, the penalty fee does not ensure that any actual emissions reduction will ever occur since every source can pay a penalty rather than achieve actual emissions reductions. The provision's plain language evinces an intent to penalize emissions in excess of a threshold by way of a fee; it does not have as a stated purpose the goal of emissions reductions" *(*70 FR 69440, 69441 - 69442). Major stationary sources may elect to reduce their emissions to reduce the fee owed, or they may elect to pay the fee without reducing their emissions.

EPA also previously issued guidance *(Guidance on Establishing Baselines under Section 185 of the Clean Air Act (CAA) for Severe and Extreme Ozone Nonattainment Areas that Fail to Attain the 1-hour Ozone NAAQS by their Attainment)* on March 21, 2008 (available at *www.epa.gov/ttn/caaa/t1/memoranda/20080321_harnett_emissions_basline.pdf),* regarding establishing emission baseline amounts. The March 21, 2008, guidance memo discussed

alternative methods for calculating the baseline amount, as permitted by FCAA, §185. EPA noted that in some cases, baseline amounts may not be representative of normal operating conditions because a source's emissions may be irregular, cyclic, or otherwise vary significantly from year to year. This concept would be applicable regardless of the fee program implemented or the ozone standard requiring the fee program.

EPA indicated in its guidance that relying on its regulations for Prevention of Significant Deterioration (PSD) of Air Quality, which are found in 40 Code of Federal Regulations (CFR) §52.21(b)(48), would be an acceptable alternative method for calculating the baseline amount. Under the PSD rules, sources may use emissions data from any period of 24 consecutive months within the previous ten years (a two-in-ten look back period) to calculate an average annual actual emissions rate. EPA determined the two-in-ten look back period to be reasonable because it allows sources to consider an average emissions rate for a full business cycle.

The PSD rules modify this concept for electrical utility steam generating units to 24 consecutive months within the previous five years (a two-in-five look back period) due to a shorter business cycle for those units. The commission agrees that use of the two-in-ten and two-in-five look-back periods is reasonable for sources for which emissions are irregular, cyclical, or otherwise vary significantly from year to year, and the commission proposes to provide this option in the same manner as provided for in the Texas New Source Review Program. Since the PSD guidance is specific to sources for which emissions are irregular, cyclical, or otherwise vary significantly from year to year, the averaging option would not be available for sources with steady-state operations.

A variability analysis on sites reporting to the TCEQ point source emissions inventory was performed to determine if VOC and NO_x emissions were variable over the twelve-year period

between 2011 (the base year for the 2008 ozone standard) through 2022 (the most recent complete point source emissions inventory at the time this analysis was performed) for the DFW and HGB severe nonattainment areas. Data for the DFW and HGB variability analysis were analyzed separately for VOC and NO_x emissions. Sites that reported mean 2011 through 2022 emissions greater than 20 tons per year in the TCEQ emissions inventory were included in this analysis.

A site's emissions were determined to be variable if the following formula was true, where x = VOC or NO_x emissions and σ = one standard deviation of the data set:

Figure 1: Formula for Emissions Variability Determination

$$\overline{x}_{lookback\ period} > \overline{x}_{2011-2022} + \sigma_{2011-2022}$$

Variability of reported NO_x and VOC emissions ranged from 3% to 128% in the HGB area and from 0.1% to 265% in the DFW area over the twelve years examined. Fifty-nine percent or 162 of the 274 NO_x and/or VOC emissions sources in the HGB area were variable as defined by the above formula. Forty-eight percent or 115 of the 238 NO_x and/or VOC emissions sources in the DFW area were variable as defined by the above formula.

The variability analysis shows that a high level of source-level emissions variability occurred between 2011 and 2022 in the DFW and HGB severe nonattainment areas; therefore, it is appropriate to use a 24-month period during the previous ten years (or five years if the source is an electric utility steam generating unit) to establish a baseline for the FCAA, §185 fee program.

Based on the analysis above, the commission proposes to use EPA's baseline guidance and EPA's long-standing PSD regulations for sources with emissions that are irregular, cyclic, or otherwise vary significantly to offer an option for these source types to establish a baseline amount. Since FCAA, §185 states that the baseline amounts may be adjusted for these types of sources if the EPA Administrator issues guidance, the commission has proposed these provisions based on these EPA guidance documents.

Like the HGB Failure to Attain Fee Rule, the commission proposes to use the Texas Emissions Reduction Plan (TERP) revenue from each area collected after the 2008 eight-hour ozone attainment (baseline) year to offset the area's FCAA, §185 fee obligation.

The objectives of TERP are specifically described in statute and are consistent with EPA's objective for an equivalent FCAA, §185 fee program. TERP program objectives, listed in Texas Health and Safety Code (THSC), §386.052, address "achieving maximum reduction in oxides of nitrogen to demonstrate compliance with the state implementation plans" and "advancing new technologies that reduce oxides of nitrogen from facilities and other stationary sources." TERP, as described in THSC, §386.053, is restricted to having "safeguards that ensure that funded projects generate emissions reductions not otherwise required by state or federal law."

TCEQ implements TERP to reduce NO_x emissions, a precursor to ozone pollution. TERP grant programs provide financial incentives to individuals, state and local governments, corporations, and other legal entities to upgrade or replace their older, higher emitting vehicles and equipment with newer, cleaner vehicles and equipment. The TERP programs also encourage the use of alternative fuels for transportation in Texas, and the implementation of new technologies that reduce emissions from stationary sources and oil and gas operations.

In the DFW severe nonattainment area, mobile source NO_x emissions are the single-largest category of the 2023 emissions inventory at 65%. In the HGB severe nonattainment area, mobile source NO_x emissions are the single-largest category of the 2023 emissions inventory at 55%. The emissions reduction grant programs that TERP funds decrease ozone precursor emissions more directly than a penalty fee assessed on major stationary sources. The commission proposes rules to credit the TERP revenue collected as an equivalent approach because TERP meets one of the three types of alternative programs that satisfy the requirements addressed in EPA's 2010 guidance memo. The grant programs funded through TERP are the same or similar programs that EPA previously approved as meeting the requirements for FCAA, §185 fee program equivalency under the HGB Failure to Attain Fee Rule.

Fees and surcharges related to the sale and use of vehicles and heavy-duty equipment in Texas fund the TERP programs. TCEQ would credit all revenue allocated for TERP programs and administration. TCEQ would identify and track TERP revenue generated from the DFW severe nonattainment area and the HGB severe nonattainment area in two separate Fee Equivalency Accounts to demonstrate equivalency of the area-specific TERP revenue to the penalty fee owed by major stationary sources located in that area.

Under the proposed rules, the commission would be required to annually estimate the expected Area §185 Obligation and compare this estimation with the expected TERP revenue. The commission proposes that TERP revenue collected after the attainment year (baseline year) and statutorily available for TERP programs would be credited towards meeting the FCAA, §185 fee obligation. For the DFW and HGB 2008 eight-hour ozone nonattainment areas, 2027 is the attainment year (baseline year) contained in the July 20, 2027, attainment date. Barring any extension to the attainment date, any TERP revenue generated from the nonattainment area starting with 2028 that is statutorily available for TERP programs could be credited to meet the

Area §185 Obligation for DFW and HGB 2008 eight-hour ozone nonattainment areas.

To obtain the estimated total FCAA, §185 fee due from all major stationary sources, a baseline amount would be established for each major stationary source (or group of sources under a Section 185 Account, if aggregated as proposed and discussed later in this preamble) within the DFW 2008 eight-hour ozone nonattainment area or located within the HGB 2008 eight-hour ozone nonattainment area. The two nonattainment areas are assessed separately, resulting in two Area §185 Obligations, one for DFW and one for HGB. Each major stationary source's or Section 185 Account's reported baseline amount(s) and actual emissions would be used to calculate a Failure to Attain Fee. The resulting amount due from each major stationary source or Section 185 Account for aggregated sources would be summed by location to determine the overall DFW and HGB 2008 eight-hour ozone nonattainment area's Area §185 Obligations.

If revenue generated from TERP is insufficient to fully offset the Area §185 Obligation for the DFW 2008 eight-hour ozone nonattainment area or HGB area 2008 eight-hour ozone nonattainment, then the remaining difference would be assessed as a Failure to Attain Fee on a major stationary source or Section 185 Account for the area on a prorated basis. The amount collected from each major stationary source or Section 185 Account would be discounted based on the amount of revenue credited to the Fee Equivalency Account. In this manner, these proposed rules would "backstop" any TERP revenue with fees directly assessed on major stationary sources as necessary to meet each year's fee. The Area §185 Obligation would be fully met either through the demonstration from the Fee Equivalency Account or, if necessary, supplemented with directly assessed fees on major stationary sources or Section 185 Accounts. This method of fee equivalency is no "less stringent" than a direct fee program required by FCAA, §185.

To determine a major stationary source's baseline amount and the Failure to Attain Fee that would apply to each major stationary source, the commission proposes to provide major stationary sources a choice to individually determine baselines for VOC and NO_x emissions, aggregate VOC and NO_x emissions into one baseline if the source is major for both pollutants, or aggregate those emissions across multiple major stationary sources under common control. In Attachment C of EPA's 2010 guidance memo, EPA states it would ". . . allow for aggregation of sources. We anticipate that we would be able to approve a FCAA, §185 fee program SIP that relies on a definition of 'major stationary source' that is consistent with the FCAA as interpreted in our existing regulations and policies." EPA's 2010 memo further states that EPA would allow aggregation of VOC with NO_x emissions, ". . . provided that the aggregation is not used to avoid a 'major source' applicability finding, and aggregation is consistent with the attainment demonstration . . . we believe states have a discretion to allow a major source to aggregate VOC and NO_x emissions." The proposed rulemaking would require a major stationary source to first determine its major source applicability for both VOC and NO_x emissions. In this approach, a major stationary source cannot use aggregation to avoid applicability of the FCAA, §185 fee rule. If the major stationary source chooses to aggregate baselines by pollutant or site or both, it would be required to provide to TCEQ the individual, unaggregated pollutant and site baselines for each pollutant(s) that determines major source status. This will ensure that staff can accurately enter aggregated baseline amounts into the TCEQ's Section 185 fee database.

In making determinations of whether common control exists, the commission would consider EPA guidance regarding common control. For example, in a final rule on the *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Emissions Offset Interpretive Ruling* (45 FR 59878, September 11, 1980), EPA stated it would determine control guided by the general definition of control used by the Securities and Exchange Commission (SEC). In SEC considerations of control, control "means the possession, direct or indirect, of the power to

direct or cause the direction of the management and policies of a person whether through the ownership of voting shares, contract, or otherwise" (17 CFR §210.1 and §210.2(g)). EPA generally continues to assess common control based on the general principles outlined above and has periodically issued additional guidance for specific topics such as how to assess contiguous or adjacent properties, industrial grouping, etc. The commission would also use other criteria to determine common control consistent with participation in local area banking programs, such as the Mass Emissions Cap and Trade or the Highly-Reactive Volatile Organic Compound Cap and Trade programs. A group of major stationary sources choosing to aggregate under common control as a single customer would be identified with a single common customer identifier used by the commission, the customer number (CN). A group of major stationary sources under common control would be assigned a single Section 185 Account number by TCEQ.

Since VOC and NO_X emissions reductions are both effective at lowering ozone concentrations in both the DFW and HGB 2008 eight-hour ozone nonattainment areas, major sources should be allowed to aggregate both NO_X and VOC emissions into one baseline amount. The commission adopted a strategy of targeting those pollutants in a way that would allow ozone nonattainment areas to attain the standard as expeditiously as practicable in the applicable attainment demonstration SIPs. States are required by the FCAA to assess and develop strategies for nonattainment areas, as part of the SIP revision process, to achieve attainment and maintenance of the standard, and this approach is a result of the knowledge gained from research and detailed photochemical modeling of each nonattainment area. The commission's proposed flexibility option to allow aggregation of VOC and NO_X as well as major stationary source aggregation for both pollutants continues to support the strategies outlined in the attainment demonstration SIPs. This proposed aggregation method compliments the multi-pollutant control strategies incorporated into the SIP for the DFW and HGB ozone nonattainment areas.

As addressed previously, FCAA, §185 requires the SIP to include a requirement for the imposition of a penalty fee on major stationary sources of emissions of VOC in a severe or extreme ozone area that failed to attain the standard by its applicable due date. FCAA, §182(f) states that requirements "for major stationary sources of volatile organic compounds shall also apply to major stationary sources (as defined in §7602 of this title and subsections (c), (d), and (e) of this section) of oxides of nitrogen." Thus, the requirement to assess a fee on major stationary sources of NO_x emissions is also required. This language in FCAA, §182(f) does not explicitly state that requirements for NO_x sources are to be held separate from those for VOC but are "also required" for sources of NO_x emissions. Both VOC and NO_x control strategies have a common goal: to reduce ozone-forming emissions. The stated objective of FCAA, §182(f) and §185 is to assess a fee for VOC and NO_x emissions on major stationary sources emitting above a certain baseline amount of emissions. The Section 185 per ton fee rate required for the pollutants remains the same regardless of whether the pollutant is VOC or NO_x and thus, there is no reason to require that a fee be assessed separately for each pollutant. The commission proposes to allow a major stationary source to combine these emissions for baseline amount determinations and fee assessments providing that specified criteria are met to ensure consistency.

Additionally, the commission notes that EPA guidance allows for NO_x substitution in its reasonable further progress (RFP) SIP revisions as further support for allowing VOC and NO_x emissions to be aggregated for both baseline amount determinations and fee assessments. In its December 1993 NO_x Substitution Guidance (available at *http://www.epa.gov/ttncaaa1/t1/memoranda/noxsubst.pdf),* EPA states the "condition for demonstrating equivalency is that the State-proposed emission control strategies must be consistent with emission reductions required to demonstrate attainment of the ozone NAAQS

for the designated year of attainment."

To ensure equitable treatment among all major stationary sources, maintain consistency within the fee program, and facilitate transparency for the public, the proposed rules require that baseline amounts and aggregation methods, once established, would remain fixed as long as the proposed rule remains applicable except as consistent with the proposed sections that allow adjustments under specific circumstances. Additionally, the proposed rules would require that calculation of the Failure to Attain Fee remain consistent with the baseline amount determination approach. Once a particular method for a baseline amount calculation is chosen, the Failure to Attain Fee calculation must remain consistent with that method. Therefore, if a major stationary source elected to aggregate pollutants under one of the options of this proposed rulemaking as the most appropriate choice for determining a baseline amount, all subsequent assessments, and payments of the Failure to Attain Fee must remain consistent with that selection.

The commission also proposes compliance schedules for determining baseline amounts for each applicable baseline amount scenario. Since the proposed Failure to Attain Fee cannot be implemented until EPA finalizes a failure to attain notice that determines that a severe or extreme nonattainment area under the 2008 eight-hour ozone standard did not attain by the applicable due date, the due dates for major stationary sources operating during the baseline year are structured to account for issuance of this notice. New major stationary sources that begin operating during or after the baseline year would have a fixed amount of time to self-report the baseline amounts to TCEQ. The compliance schedules would ensure timely assessment of the fee.

The commission proposes to invoice and require fee payment in accordance with current state

statute and regulations. Once the program is implemented, fee payments would be due each year until the Section 185 fee is terminated.

If this proposed rule is adopted, any Section 185 fee revenue collected by TCEQ would be deposited into the Clear Air Account according to THSC §382.0622. Since spending potential Section 185 fee revenue depends on this proposed rule's adoption, Texas' collection of the Section 185 fee, and future Legislative actions, this proposed rulemaking does not include options for how any potential collected Section 185 revenue would be spent.

The proposed rules would ensure stability of the Clean Air Account and any potential future programs that could be developed using the Failure to Attain Fee revenue by preventing adjustments to previously invoiced baseline amounts for instances in which baselines are adjusted as proposed in §101.708, §101.709, §101.710, and §101.711. No matter the scenario used to adjust the baseline amount it would apply starting with the next fee assessment year.

Section by Section Discussion

§101.700, Definitions

This proposed new section contains definitions necessary for applying the rules. The terms defined include actual emissions, Area §185 Obligation, attainment date, baseline amount, baseline emissions, baseline year, electric utility steam generating unit, emissions unit, equivalency credits, extension year, Failure to Attain Fee, fee assessment year, fee collection year, major stationary source, and Section 185 Account.

As proposed, the term *actual emissions* would use the definition currently used in 30 TAC §101.10; this would ensure that the VOC and/or NO_x emissions assessed for the *Failure to Attain Fee* include all emissions emitted from the major stationary source for the calendar year

being assessed, whether authorized or unauthorized emissions.

The *Area §185 Obligation* is proposed to be defined as the total amount of the *Failure to Attain Fee* due for an entire 2008 eight-hour ozone nonattainment area based on summing the *Failure to Attain Fee* due from each major stationary source for a fee assessment year. For the 2008 eight-hour ozone standard, the 10-county DFW and eight-county HGB nonattainment areas would have separate *Area §185 Obligations*. EPA's 2010 guidance states that an equivalent program could be acceptable under FCAA, §172(e) if an alternative fee or program is equivalent to the fee that would be assessed on an area failing to meet the ozone standard. The *Area §185 Obligation* is the basis for making an equivalency demonstration for the commission's proposed program. The *equivalency credits* are proposed to be defined as revenue collected in a calendar year from TERP to offset the *Area §185 Obligation* on a dollar-to-dollar basis. If there are insufficient funds to offset the entire *Area §185 Obligation,* then *Failure to Attain Fee* would be prorated and the prorated fee amount assessed directly on major stationary sources or Section 185 Accounts to meet the entire *Area §185 Obligation.*

Attainment date is proposed to be defined as the EPA-specified date an area is required to attain the 2008 eight-hour ozone standard under the FCAA.

The attainment year is the entire calendar year that contains the *attainment date.* For purposes of this proposed rulemaking, the *baseline year* is proposed to be defined as January 1 through December 31 of the attainment year. At the time of the proposed rulemaking, there were two areas classified as severe nonattainment under the 2008 eight-hour ozone standard, the 10-county DFW nonattainment area (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise Counties) and the eight-county HGB nonattainment area (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties). The severe

classification attainment date for these areas is July 20, 2027; therefore, the 2027 calendar year from January 1, 2027, through December 31, 2027, would determine both the attainment year and *baseline year* of 2027, unless EPA approved an attainment date extension under FCAA, §181(a)(5).

Consistent with FCAA, §185, *baseline amount* is proposed to be the lower of baseline emissions (actual emissions as described in §101.705) or total annual authorized or pending authorization emissions at a major stationary source as of December 31 of the baseline year if the major stationary source operated the entire baseline year. For major stationary sources that began operating during or after the baseline year, the first full year (12 consecutive months) operating as a major source would be used to determine the baseline emissions. If the major stationary source's emissions are irregular, cyclical, or otherwise vary significantly from year to year, the *baseline emissions* are proposed to be averaged from any single consecutive 24-month period within a historical period, as outlined in the proposed definition of *baseline emissions*.

For purposes of this proposed rulemaking, the term *baseline emissions* represents the "actual emissions" referenced in FCAA, §185(b)(2) and excludes unauthorized emissions. The baseline emissions are reported in the annual point source emissions inventory according to the Emissions Inventory Requirements of 30 TAC §101.10. The baseline emissions are proposed to include reported annual emissions that are authorized by permit or rule from routine operations, which includes authorized MSS activities during the baseline year or another time period as allowed by this proposed rule, but excludes unauthorized emissions. Emissions from emissions events and MSS activities not authorized by permit or rule must be excluded from the baseline emissions calculations because they are not authorized or representative of routine operations. The exclusion of unauthorized emissions from the baseline emissions calculation is consistent with the PSD definition of baseline actual emissions in §116.112 and 40 CFR

§52.21(b)(48) that does not include unauthorized emissions in a baseline amount determination.

This proposed definition of *baseline emissions* differs from the definition of *actual emissions* in 30 TAC §101.10, which includes all emissions emitted, whether authorized or unauthorized, reported in the emissions inventory. The proposed definition of *baseline emissions* represents only the emissions from authorized routine operations reported in the emissions inventory.

If the major stationary source's emissions reported in the emissions inventory are irregular, cyclical, or otherwise vary significantly from year to year, the *baseline emissions* are proposed to be averaged from any single consecutive 24-month period within a historical period. The historical period allowed depends on the type of emissions units, following PSD guidance. *Electrical utility steam generating units* are included in this proposed rule because they may use a five-year historic look-back period. The definition of *electric utility steam generating units* is consistent with the definition used in 30 TAC §116.12. Other *emissions units*, as defined in §101.1, may use a ten-year historic look-back period.

Extension year is proposed to be defined as a year that meets the requirements of FCAA, §181(a)(5). It is unknown whether the 10-county DFW or the eight-county HGB severe nonattainment areas under the 2008 eight-hour ozone standard may qualify for an extension, and an extension year may be applicable to future areas designated as severe or extreme nonattainment under the 2008 eight-hour ozone standard.

The *Failure to Attain Fee* is proposed to be defined as the fee assessed and due from each major stationary source or Section 185 Account based on actual emissions, whether authorized or unauthorized, of VOC, NO_x, or both exceeding 80% of the *baseline amount*.

The *fee assessment year* is proposed to be defined as the calendar year the actual emissions were emitted and reported to the emissions inventory and used to calculate the assessed fee amount. The actual emissions include all authorized and unauthorized emissions, such as routine, MSS, and emissions events (EE) reported in the emissions inventory, as discussed in §101.713. For the 10-county DFW and eight-county HGB severe classification nonattainment areas under 2008 eight-hour ozone standard, the fee could be assessed as early as calendar year 2028 should the areas not attain by July 20, 2027. The *fee collection year* is proposed to be defined as the calendar year the fee is invoiced by TCEQ.

The definition for *major stationary source* is consistent with the definition in §116.12 for determining a major source of VOC or NO_x emissions. Because major stationary sources under common control may opt to aggregate pollutants and/or sites for purposes of *baseline amount* determination and *Failure to Attain Fee* payment, a *Section 185 Account* represents either a major stationary source (if not choosing to aggregate) or a group of two or more major stationary sources (if aggregating). A single identifying Section 185 Account number would be assigned by TCEQ to track the option chosen for *baseline amounts* and *Failure to Attain Fee* assessments in the TCEQ Section 185 database. Because major stationary sources can be aggregated on a pollutant basis, a major stationary source may be in one *Section 185 Account* for VOC aggregation and in a second *Section 185 Account* for NO_x aggregation. A single major stationary source could belong to two separate Section 185 Accounts, or a Section 185 Account may only have one major stationary source. All major stationary sources of VOC and/or NO_x emissions located in a severe or extreme 2008 eight-hour ozone nonattainment area that did not attain by the attainment date are subject to this proposed rule. Even if a major stationary source did not comply and, as a result, did not receive a Section 185 Account from TCEQ, that source would still be subject to this proposed rule and would still owe a Section 185 fee.

§101.701, Applicability

This new section proposes the applicability requirements for the FCAA, §185 fee (Failure to Attain Fee). FCAA, §185 requires areas classified as severe or extreme for ozone to include a requirement for fees on VOC emissions in excess of 80% of a baseline amount for major stationary sources located in an area failing to attain the standard by the attainment date applicable to that area. FCAA, §182(f) further requires that all SIP requirements applying to VOC emissions sources also apply for NO_x emissions sources. Proposed §101.701 identifies the provisions that apply to any 2008 eight-hour ozone nonattainment area classified as severe or extreme that fails to demonstrate attainment of the 2008 eight-hour ozone standard by its attainment date.

The proposed rule is applicable to all major stationary sources in the 2008 eight-hour ozone nonattainment area each year that the penalty fee is applicable as required by FCAA, §185. At the time of the proposed rulemaking, there were two areas classified as severe nonattainment under the 2008 eight-hour ozone standard, the 10-county DFW (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise Counties) and the eight-county HGB (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties). In the future, should EPA designate other areas of Texas as severe or extreme nonattainment under the 2008 eight-hour ozone standard, then this proposed rulemaking would be applicable to those severe or extreme nonattainment areas.

The executive director would implement this proposed rule upon EPA determining that the area failed to attain the severe or extreme 2008 eight-hour ozone standard. This determination would be the effective date of EPA's finding of failure to attain notice for severe or extreme areas under the 2008 eight-hour ozone standard published in the *Federal Register*. There are no

obligations for major stationary sources until the rule is implemented. As part of its outreach efforts, TCEQ would electronically distribute courtesy notifications to regulated entities that the Section 185 fee has been implemented. Electronic notification, as allowed under 30 TAC §19.30, would include posting on the *Stakeholder Group: Federal Clean Air Act Section 185 Fee* webpage (available at *https://www.tceq.texas.gov/airquality/point-source-ei/185-fee)*, subscribers of the *Penalty Fee for Major Stationary Sources Under the Federal Clean Air Act Section 185* email and text list (available at (*https://public.govdelivery.com/accounts/TXTCEQ/subscriber/new*), and/or other allowed electronic means of communication.

The *Failure to Attain Fee* would start being assessed for the calendar year following the missed attainment date. The proposed rule defines the attainment year as the entire calendar year that contains the attainment date. For purposes of this proposed rulemaking, the term baseline year is defined as January 1 through December 31 of the attainment year. For the 10-county DFW and eight-county HGB severe nonattainment areas under the 2008 eight-hour ozone standard, which have a July 20, 2027, attainment date, the attainment year and baseline year are anticipated to be 2027. The fee would start being assessed for calendar year 2028 (first fee assessment year), unless EPA approved an attainment date extension under FCAA, §181(a)(5).

§101.702, Exemption

This new section proposes that no Failure to Attain fee payment is due for a year determined by EPA to be an extension year under FCAA, §181(a)(5) for the 2008 eight-hour ozone standard. EPA may grant an extension year for a nonattainment area if all SIP obligations have been met and if one or fewer measured ozone exceedances occurred at any valid monitoring site in the nonattainment area in a year. It is unknown whether the 10-county DFW area or the eight-county HGB severe nonattainment area under the 2008 eight-hour ozone standard may qualify

for an extension. Additionally, an extension year may be applicable if EPA designates future areas as severe or extreme nonattainment under the 2008 eight-hour ozone standard and grants those areas an extension year. For any area granted an extension, the fee would be applicable if the severe or extreme nonattainment area did not attain by the extension attainment date specified by EPA.

§101.703, Fee Equivalency Account

This new section proposes that the executive director establish a Fee Equivalency Account. This account would be a listing of revenues from designated programs that reduce VOC or NO_x emissions in 2008 eight-hour ozone nonattainment areas. Only the revenue collected within each 2008 eight-hour ozone nonattainment area would be credited and available to offset the Area §185 Obligation in the Fee Equivalency Account. Revenue collected in the 10-county DFW 2008 eight-hour ozone nonattainment area would be credited only within that nonattainment area. Revenue collected in the eight-county HGB 2008 eight-hour ozone nonattainment area would be credited only within that nonattainment area. Specifically, TCEQ proposes that revenue collected for the TERP program would be used to offset each 2008 eight-hour ozone nonattainment area's Area §185 Obligation for the area when funds are also expended within each area. This would result in a benefit directly to the nonattainment area from revenue collected. TERP's stated goals and statutory restrictions provide funding for programs or activities that result in reductions in VOC, NO_x, and other pollutant emissions into the atmosphere.

No transfer of revenue would occur between TERP and the Fee Equivalency Account. The Fee Equivalency Account is a documentation mechanism to verify the amount of TERP revenue collected in the 2008 eight-hour ozone nonattainment area to offset the fee on major stationary sources located in that area. If other emissions reduction grant programs become available

those would be considered for inclusion to offset the Failure to Attain Fee.

§101.704, Fee Equivalency Accounting

This new section proposes that the Area §185 Obligation would be the total FCAA, §185 fee determined annually for each 2008 eight-hour ozone nonattainment area. The FCAA, §185 fee (Failure to Attain Fee) is proposed to be calculated for each major stationary source or Section 185 Account by TCEQ staff using the approved baseline amounts and emissions inventory data for the fee assessment year. These resultant individual Failure to Attain Fees would be summed to determine the overall Area §185 Obligation within the same 2008 eight-hour ozone nonattainment area.

Revenue, calculated on a dollar basis, associated with the Fee Equivalency Account would be credited starting with the first fee assessment year and continuing annually. The funding associated with the Fee Equivalency Account for a given fee assessment year would be compared with the Area §185 Obligation for a given fee assessment year.

If the Fee Equivalency Account does not have enough funds to fully meet the Area §185 Obligation, a backstop provision would be invoked under which major stationary sources or Section 185 Accounts would be assessed a prorated Failure to Attain Fee to generate sufficient funds to meet the Area §185 Obligation. The prorated Failure to Attain Fee would be calculated based on the amount in the Fee Equivalency Account and the overall Area §185 Obligation. The Failure to Attain Fee amount that the major stationary source or Section 185 Account would be required to pay is proposed to be reduced to the prorated Failure to Attain Fee amount based on the calculations in this proposed rulemaking. This process would be documented and made publicly available each year.

For example, a hypothetical Area §185 Obligation for HGB for the 2028 fee assessment year is calculated by TCEQ staff as $154 million. The HGB area Fee Equivalency Account for calendar year 2028 has $45 million available from TERP revenue. The HGB area balance for the 2028 fee assessment year is $109 million ($154 million less $45 million) and that amount must be paid by major stationary sources located in HGB that are subject to the Failure to Attain Fee. For the 2028 fee assessment year, the Fee Equivalency Account covers 29.22% ($45 million divided by $154 million, with the quotient multiplied by 100) of the Area §185 Obligation for HGB and each major stationary source's or Section 185 Account's fee will be reduced by 29.22%. TCEQ staff calculates that the Failure to Attain Fee for a hypothetical Section 185 Account located in HGB is $50,000 for the 2028 fee assessment year. The prorated Failure to Attain Fee for the hypothetical Section 185 Account would be calculated by reducing the $50,000 fee by 29.22%, resulting in the hypothetical Section 185 Account owing $35,389.61.

The timing of the demonstration would likely occur in December and then annually afterward, except for the first year the program is implemented. The date that TCEQ performs this evaluation for the first year of program implementation depends on the dates of future federal or state actions that are not currently scheduled (e.g., effective date in the *Federal Register* of EPA's finding of failure to attain).

§101.705, Baseline Amount

This new section proposes the requirements for determining a baseline amount. FCAA, §185 requires a fee on emissions exceeding 80% of a fee baseline amount determined for the attainment year (referenced as baseline year in this proposed rulemaking) until the Section 185 fee (referred to as Failure to Attain Fee in this proposed rulemaking) no longer applies to the area. Unless the major stationary source or Section 185 Account qualifies for an adjustment to the baseline amount, as outlined in the various adjustment sections of this proposed

rulemaking, the method for a fixed, one-time calculation of the baseline amount is provided in this proposed section.

A baseline amount would be required for each ozone precursor pollutant, VOC and/or NO_x, for which the source is major. If a stationary source is major for both VOC and NO_x emissions, a baseline amount would be required for both VOC and NO_x emissions. If the major stationary source is major for only VOC or NO_x emissions, the baseline amount would be required for just that pollutant, VOC or NO_x.

The baseline amount is proposed to be defined as the lower of either: the *baseline emissions* defined as the total annual routine emissions, including reported MSS emissions that are authorized by permit or rule, reported in the emissions inventory, as described in 30 TAC §101.10 for the baseline year, or timeframe otherwise specified in this proposed rule; or the total annual emissions allowed by the applicable authorizations or pending authorizations in effect for the major stationary source during the baseline year or timeframe otherwise specified in this proposed rule. MSS emissions reported in the emissions inventory that are authorized by permit or rule are considered routine and must be included in baseline emissions. The major stationary source's authorized or pending authorization emissions include emissions allowed under any TCEQ-enforceable measure or document, such as rules, regulations, permits, orders of the commission, and/or court orders.

Emissions from pending authorizations with administratively complete applications as of December 31 of the baseline year or timeframe otherwise specified may be included in the total annual emissions allowed under authorizations. Some owners or operators of major stationary sources may submit administratively complete applications for authorizing previously unauthorized emissions prior to December 31 of the baseline year or other approved

timeframe. To not penalize sources in the process of obtaining an authorization, the commission proposes to allow the emission limits established by permits that were administratively complete to adjust the baseline amount by adding these amounts to the total annual authorized emissions. The proposed approach aligns with the FCAA intent of comparing authorized emissions with reported actual emissions to determine a baseline amount.

A timeframe chosen other than the baseline year to determine a baseline amount depends on whether the major stationary source began operating during or after the baseline year or if the major stationary source's emissions qualify to be averaged over a 24-month consecutive period. Applicable timeframes for baseline amounts are outlined in this proposed rulemaking.

Unauthorized emissions, such as from EE and MSS activities not authorized by permit or rule, are not included in the baseline amount. Exclusion of unauthorized emissions from a baseline amount is consistent with these emissions not being representative of normal, routine operations and with the PSD definition of baseline actual emissions in §116.112 and 40 CFR §52.21(b)(48). For example, an oil and gas major stationary source for both VOC and NO_x emissions experienced VOC emissions from tank flashing that exceeded an authorized permit limit. Tank flashing is a routine operation so the unauthorized VOC emissions resulting from the tank flashing that exceeded the permit limit are required to be reported in the emissions inventory as annual routine emissions. The unauthorized but routine VOC emissions from the tank flashing would be excluded from the baseline emissions calculations used to determine baseline amount.

If the major stationary source has reported emissions in the emissions inventory that are irregular, cyclical, or otherwise vary significantly from year to year, an alternate method to determine baseline emissions would be allowed. Whether a source qualifies as irregular,

cyclical, or otherwise varying significantly is determined on a case-by-case basis. For these major stationary sources, any single consecutive 24-month period within a specified historical period could be averaged for the baseline emissions. Major stationary sources that qualify to establish an equivalent alternate fee baseline amount in this manner would calculate the baseline emissions using historical annual routine emissions, as recorded in the emissions inventory, which includes authorized emissions from MSS activities.

The FCAA, §185 does not address how to define a historical period; however, EPA issued a March 21, 2008, guidance memo, referenced elsewhere in this preamble, stating that an acceptable alternate method would be to determine an baseline amount using a period similar to estimating "baseline actual emissions" found in EPA's PSD rules, 40 CFR §52.21(b)(48). In its March 21, 2008, guidance, EPA used these provisions to craft its guidance on a ten-year look-back period for calculating baseline actual emissions. The PSD rules require adequate data for the selected 24-month period. The data must adequately describe the operation and emission levels for each emissions unit. The guidance continues by stating: "Once calculated, the average annual emission rate must be adjusted downward to reflect 1) any noncompliant emissions (40 CFR §52.21(b)(48)(i)(b) and (ii)(b)); and 2) for each non-utility emissions unit, the most current legally enforceable emissions limitations that restrict the source's ability to emit a particular pollutant or to operate at levels that existed during the 24-month period that was selected (40 CFR §52.21(b)(48)(ii)(c))." The result of this restriction is that the plant capacity may be used during the historical 24-month period selected, but emissions that do not comply with legally enforceable limits would have to be excluded. Legally enforceable emissions limits would include any state or federal requirements, including Best Achievable Control Technology or Lowest Achievable Emissions Rate.

According to PSD guidance, the timeframe for the historical look-back period for emissions

units other than electric steam generating units is any single consecutive 24-month period within the ten-year period immediately preceding the date a complete permit application was submitted. For electric steam generating units the timeframe for the historical look-back period is any single consecutive 24-month period within the five-year period immediately preceding the date a complete permit application was submitted. The historical look-back period for the proposed equivalent alternate fee baseline amount determination would start the calendar year immediately preceding the baseline year. All emissions units at a major stationary source or Section 185 Account would be required to use the same 24-month period when calculating baseline amounts for aggregated pollutants or sites under common control or ownership. The commission interprets the FCAA, §185 language requiring the use of the lower of baseline emissions (actual emissions from the emissions inventory as defined in §101.701) or emissions allowed under authorizations (e.g. permitted emissions) to include emissions from this alternate method.

At the time of this proposed rulemaking, the baseline year is anticipated to be 2027 for the 10-county DFW and eight-county HGB 2008 eight-hour ozone standard severe nonattainment areas. The window used for the possible historical look-back period would be five years (2022 - 2026) for electric generating units (EGU) or 10 years (2007 - 2026) for non-EGU immediately preceding January 1, 2027. The average emissions during the single consecutive 24-month period would be the basis for determining the baseline emissions, in tons.

If rules or regulations take effect during the baseline year and/or 24-month consecutive period used for baseline amount determination, then the baseline emissions and total annual authorized emissions must be adjusted downward to reflect emissions that would have exceeded a legally enforceable emissions limitation requirement from a permit, rule, regulation, commission order, or court order during the applicable timeframe. The major stationary source

would not be allowed to take credit for emissions reductions that would have resulted from state or federal rules or regulations implemented during the baseline year and/or 24-month consecutive period used to calculate the baseline amount.

For example, a major stationary source of VOC emissions started operating prior to the 2027 baseline year, and the baseline amount was established from the baseline emissions during the 2027 baseline year. On March 1, 2027, a hypothetical federal rule takes effect that limits emissions from coatings emissions units located at the major source. The baseline emissions for the coatings emissions units impacted by the 2027 federal rule's emissions limits would be adjusted downward from January 1, 2027, through February 28, 2027, to account for the new limit. In another example, a major source of VOC emissions establishes a baseline amount using the 24-month consecutive period from July 12, 2022, through July 12, 2024. During calendar year 2027, a hypothetical federal rule takes effect that limits emissions from coatings emissions units located at the major source during the 24-month consecutive period chosen for the baseline amount. The baseline emissions for coatings emissions units impacted by the 2027 federal rules' emissions limits would be adjusted downward during the July 12, 2022, through July 12, 2024, period chosen for the baseline amount.

Fugitive emissions would be required to be included for the purposes of the baseline emissions calculations and fee assessments. This is similar to the Title V Emissions Fees described in 30 TAC §101.27, which requires all fugitive emissions to be included in fee calculations after applicability of the fee has been established. Per 40 CFR §70.2, fugitive emissions of VOC or NO_x belonging to one of the categories listed in paragraph 2 of the definition of major sources may be excluded from counting toward major source applicability. Once the source meets the major stationary source applicability requirements of 30 TAC §116.12, fugitive emissions are required to be reported in the emissions inventory, and the fugitive emissions must be used for

both baseline emissions calculations and fee assessments.

As allowed under the Emissions Inventory Requirements described in 30 TAC §101.10, a regulated entity that meets the applicability requirements to submit an emissions inventory, which includes major stationary sources, may submit a certifying letter instead of reporting updated emissions in the emissions inventory. The certifying letter option is allowed for any regulated entity (identified by the nine-digit regulated entity reference number (RN) and a seven-character alphanumeric TCEQ account number) that experienced an insignificant change in operating conditions compared to the most recently submitted emissions inventory. An insignificant change in emissions is defined as including start-ups, permanent shut-downs of individual units, or process changes that result in at least a 5.0% or 5 tpy, whichever is greater, increase or reduction in total annual emissions of VOC, NO_x, carbon monoxide, sulfur dioxide, lead, particulate matter (PM) less than or equal to 10 microns in diameter, or PM less than or equal to 2.5 microns in diameter. If a regulated entity submits a certifying insignificant change notification letter instead of updating the emissions, then the emissions reported in the most recently submitted emissions inventory are copied over to the current emissions inventory reporting year. For example, if a regulated entity submits an insignificant change notification letter for the 2027 emissions inventory reporting year and TCEQ staff verified that the requirements of the insignificant change notification letter were met, then the 2026 emissions are copied over to also represent the 2027 emissions. Major sources are cautioned to consider the impacts of choosing to submit an insignificant change letter instead of updating emissions in the emissions inventory because of the implications for baseline amount determinations and fee assessments.

Emissions inventory data are collected annually by the commission and, after quality assurance review, are loaded into the state's air emissions inventory database, the State of Texas Air

Reporting System (STARS). Since Texas' emissions inventory program submits data to EPA's National Emissions Inventory (NEI), the quality assurance of emissions inventory data is subject to a federally mandated Quality Management Plan (QMP) that annually documents and describes the emissions inventory organization arrangements, processes, procedures, and requirements. As part of the QMP, the emissions inventory program annually submits a Quality Assurance Project Plan (QAPP) documenting the emissions inventory quality assurance process for EPA's review and approval. The QAPP includes information on how TCEQ staff perform annual detailed technical reviews of point source emissions inventories, correct issues, and document the outcome of the review. Actual emissions reported in the emissions inventory that are subject to the detailed quality assurance process include: all emissions resulting from routine operations, including emissions from authorized MSS activities; all unscheduled MSS activities (reportable and non-reportable); and all emissions events (reportable and non-reportable). Owners or operators of major stationary sources are provided an opportunity to review and, if necessary, revise emissions submitted for the current reporting year and for the reporting year immediately prior. Revisions to historical inventory data outside of this timeframe are done on a case-by-case basis usually as a result of a TCEQ-directed emissions inventory improvement initiative or TCEQ's compliance and enforcement processes. The commission uses emissions inventory data for air quality planning, as detailed in SIP revisions. Although emissions determination methods improve over time, emissions inventory data represent emissions for a reporting year as accurately as possible. Since the commission relies upon emissions inventory data in SIP revisions for air quality planning purposes, revising historical emissions inventory emissions rates solely for purposes of adjusting the baseline amounts and related calculations is not supported. Similar to emissions inventories, air permits are reviewed to ensure accuracy of emissions.

A baseline amount would account for all emissions units located at the major stationary source as of December 31 of the baseline year. Any ownership transfer of emissions units that occurred by December 31 of the baseline year would also need to be included in the baseline amount calculation. If a 24-month consecutive period is chosen for a major source that operated the entire baseline year, then all emissions units located at the major stationary source as of December 31 of the baseline year must be included, regardless of whether they were located at the major stationary source during the period chosen. An owner or operator of a major stationary source or Section 185 Account may not exclude new emissions units added by the baseline year from the 24-month consecutive historical period. For example, a qualified major stationary source chooses March 19, 2022, through March 19, 2024, as the 24-month consecutive period for the baseline emissions. An emissions unit was purchased, and ownership transferred to the source on September 1, 2026; therefore, those emissions must be averaged and added to the 24-month period chosen. The major stationary source that sold the emissions units may not include the sold emissions units in their baseline amount to avoid double-counting of the same emissions units in different baseline amounts.

The proposed rule would require that the baseline amount calculation and supporting documentation be submitted to TCEQ in a format specified by the executive director. Documentation would include either a list of all emission units by their corresponding path-level emissions reported in the point source emissions inventory or all applicable air permits by Emissions Point Identification Number (EPN) (depending on which one is required for the baseline amount determination). If a major source uses path-level emissions to determine baseline amounts, VOC and/or NO_x emissions must be reported by a combination of Facility Identification Number (FIN) and corresponding EPN that match the most recent point source emissions inventory. If a major stationary source uses permitted allowable emissions to determine baseline amounts, VOC and/or NO_x emissions must be reported at the EPN level.

Sample calculations would be required for each path-level (emissions inventory) or EPN level (air permits) used for baseline amount determination.

A major stationary source may choose to establish a baseline amount from baseline emissions for sources with emissions that are irregular, cyclic, or otherwise vary significantly from year to year. Sufficient supporting documentation would be required to verify that the major stationary source's emissions qualify as irregular, cyclical, or otherwise vary significantly from year to year. Additionally, details on why and how the 24-month consecutive period chosen accurately represents the major source's emissions would be required.

There is no list of sites that meet the definition of a major stationary source as defined in 30 TAC §116.12. TCEQ would use established programs to assist with notifying major sources of NO_x and/or VOC emissions subject to the fee to provide baseline amounts by the due dates in this proposed rulemaking. Although TCEQ would attempt to notify all applicable major stationary sources by using the Title V permitting and air emissions inventory programs as surrogate data for major sources, compliance with this proposed rulemaking is required even if TCEQ does not specifically notify the major stationary source. Compliance with the Section 185 fee program is a requirement of FCAA, §185, and a major stationary source that does not provide a baseline amount by the specified due date would be subject to the executive director establishing the baseline amounts as described in this proposed rulemaking so that TCEQ can assess the required fee.

For major stationary sources operating prior to January 1 of the baseline year or that operated the entire baseline year, the regulated entity will complete the baseline amount form and supporting documentation. A specific due date for initial baseline amount cannot be provided since the implementation of the Failure to Atain Fee depends on the timing of three future

actions: TCEQ adoption of this proposed rule; the severe nonattainment areas failing to attain by July 20, 2027, based on 2024, 2025, and 2026 ambient air monitoring data (or by the date established by any extension year granted by EPA); and the effective date in the *Federal Register* of EPA's finding of failure to attain. As proposed, regulated entities would submit baseline forms either on the emissions inventory due date specified under the Emissions Inventory Requirements in 30 TAC §101.10 for the fee assessment year or 120 days from the effective date of EPA's failure to attain notice. Providing no less than 120 days for regulated entities to prepare baseline amounts allows flexibility for the executive director to initially implement the final Failure to Attain Fee rule and initiate related business processes. For the 10-county DFW and eight-county HGB severe 2008 eight-hour ozone nonattainment areas at the time of this proposed rulemaking, the baseline amount based on a 2027 baseline year may be due March 31, 2028 (depending on final Air Emissions Inventory Reporting Rule updates currently in progress by EPA as of the date of this proposed rulemaking), or 120 days from the effective date of EPA's failure to attain notice.

Electronic notification, as allowed under 30 TAC §19.30, would include posting on the *Stakeholder Group: Federal Clean Air Act Section 185 Fee* webpage (available at *https://www.tceq.texas.gov/airquality/point-source-ei/185-fee)*, subscribers to the listserv for *Penalty Fee for Major Stationary Sources Under the Federal Clean Air Act Section 185* would receive email and/or text notifications (sign-up available at (*https://public.govdelivery.com/accounts/TXTCEQ/subscriber/new*), and/or other allowed electronic means of communication.

Once finalized, the baseline amount would be fixed and would not be changed except as consistent with the proposed adjustments in §§101.708-711.

§101.706, Baseline Amount for New Major Stationary Sources

States are required to assess the Section 185 fee on all major sources of VOC and/or NO_x emissions located in a severe or extreme ozone nonattainment area that fails to attain by its attainment date. This would include major stationary sources that began operating as a major source or transitioned to a major source status during the baseline year or after the baseline year. Since FCAA, §185 does not provide baseline amount determinations for these scenarios, the commission proposes this new section to determine a baseline amount for these new major stationary sources.

The commission proposes that these new major stationary sources use their first year (12 consecutive months) operating as a major stationary source to determine the baseline amount or aggregated baseline amount. The baseline amount must be the lower of the baseline emissions during the first year of operation as a major source or the total annual authorized emissions during the first year of operation as a major source.

EPA, in its December 14, 2012, notice of final approval of the South Coast Air Quality Management District (SCAQMD) SIP revision (77 FR 74372), allowed a major stationary source subject to FCAA, §185 rules after the attainment date in the SCAQMD to use actual emissions or authorizations (or holdings in its banking program) from its initial calendar year of operation to set a baseline amount. EPA, in its February 14, 2020, notice of final approval of the HGB Failure to Attain Fee (85 FR 8411), allowed major stationary sources to determine the baseline amounts on the lower of actual or allowable data available in their first year of operation as a major stationary source.

If rules or regulations take effect during the first full year operating as a major source, then the baseline emissions and total annual authorized emissions must be adjusted downward to

reflect those emissions limitations in effect during that timeframe. For example, a major stationary source of VOC emissions started operating January 10, 2027, and the baseline amount was established from the baseline emissions during the first full year of operation, from January 10, 2027, to January 10, 2028. On March 1, 2027, a hypothetical federal rule takes effect that limit emissions from coatings emissions units located at the major source. The baseline emissions for the coatings emissions units impacted by the 2027 federal rule's emissions limits would be adjusted downward for the entire baseline period (January 10, 2027, through January 10, 2028) to account for the new limit. The major source would not be allowed to take credit for emissions reductions that would have resulted from state or federal rules or regulations implemented or in effect during the calendar year used to calculate baseline emissions.

A baseline amount at a new major stationary source would account for all emissions units located at the major stationary source as of the last calendar day of the first full year operating as a major source. For example, a major stationary source of VOC emissions begins operating on February 4, 2028, and the baseline amounts are determined using the February 4, 2028, through February 4, 2029, timeframe. In this example, the major stationary source would include all emissions units, including any ownership transferred emissions units as of February 4, 2029, in the baseline amount.

For major stationary sources that begin operating between January 1 and December 31 of the baseline year or after December 31 of the baseline year, regulated entities would have 90 days from the last calendar day of the first full year operating as a major source to submit the baseline amount form. Since initial Section 185 fee program implementation has already occurred, a 90-day timeframe is an appropriate length of time for form submission and is consistent with emissions inventory reporting timeframes. For example, a major source of VOC

emissions begins operating on February 4, 2028, and the baseline amounts are determined using February 4, 2028, through February 4, 2029. In this example, the regulated entity would have 90 days from February 4, 2029, to submit the baseline amounts and supporting documentation.

§101.707, Aggregated Baseline Amount

This proposed new section would provide for the aggregation of either VOC or NO_x emissions (or both) at multiple major stationary sources to align fee obligations with attainment demonstration emissions reduction approaches. The proposed rule would allow owners or operators of major stationary sources under common control to aggregate baseline amounts of VOC emissions from multiple major stationary sources, to aggregate NO_x emissions from multiple major stationary sources, or both. Owners or operators may also choose to aggregate VOC with NO_x emissions at a single major stationary source or VOC with NO_x emissions across multiple major stationary sources under common control, provided that the stationary sources are major for both pollutants. Once an owner or operator chooses aggregation, then the baseline amount would remain aggregated, and the fees would be assessed in the same manner as the aggregation until the Failure to Attain Fee no longer applies to the area.

Baseline amounts would first be calculated separately for each individual major stationary source for VOC or NO_x emissions, or for both, using the method described in proposed new §101.705 or §101.706. The separate initial baseline amounts for each pollutant at an individual major stationary source must also be submitted in a format specified by the executive director with supporting documentation. Providing the separate initial calculations of baseline amounts is intended to provide transparency and consistency and to assist with quality assurance of baseline amount determinations with any subsequent aggregation. After establishing separate baseline amounts, then the baseline amount could be aggregated by multiple pollutants,

multiple stationary sources under common control, or both.

The proposed rule would allow owners or operators of major stationary sources to aggregate VOC and NO_x baseline amounts at a major stationary source. Sources under common ownership and/or control could also opt to aggregate baseline amounts across multiple major stationary sources. Only major stationary sources under common control may be included in the aggregate group. The aggregation methodology must remain consistent throughout the baseline amount calculation and assessment of the Failure to Attain Fee. A group of major stationary sources opting to aggregate baseline amounts must also aggregate emissions for Failure to Attain Fee assessment. The baseline year, same 24-month consecutive period, or other timeframe used to establish baseline amounts would be required as a basis for the baseline amount calculation for all aggregated major stationary sources for each fee calculation.

Like the baseline amount compliance schedule, major stationary sources that choose to aggregate would submit the required forms and supporting documentation either on the emissions inventory due date of the fee assessment year, as specified under Emissions Inventory Requirements in 30 TAC §101.10, or 120 days from the effective date of EPA's failure to attain notice, whichever is later. Providing no less than 120 days for regulated entities to prepare aggregated baseline amounts allows flexibility for the executive director to implement the final Failure to Attain Fee rule and initiate related business processes. For aggregation, a list of all sites under common control by RN aggregated under an baseline amount must be provided in addition to the supporting documentation provided for individual baseline amounts described under Baseline Amounts. If sites under common control chose to aggregate, then those sites must share the same Customer Reference Number (CN) in TCEQ's Central Registry database. Sites under common control are determined by TCEQ. Sites not under common control according to TCEQ may not attempt to be combined in Central Registry with

the intention of circumventing the Failure to Attain Fee, as addressed under circumvention requirements of 30 TAC §101.3.

§101.708, Adjustment of Baseline Amount for Major Sources with Less than 24 Months of Operation

Major stationary sources with less than 24 months of consecutive operation as of December 31 of the baseline year or that began operation after the baseline year would not have sufficient data to initially determine if emissions are irregular, cyclical, or otherwise vary significantly from year to year to establish baseline emissions. The provisions of this proposed new section are intended to allow a major source with less than 24 months of consecutive operation an opportunity to adjust the established baseline amount after establishing the emissions history. After completing 24 months of consecutive operations, the major stationary source may request that the baseline amount be adjusted using the average rate during the first 24 months of consecutive operation for the baseline emissions. If the total annual authorizations determined the initial baseline amount and were still lower than the adjusted baseline emissions, then an adjustment may not be requested. If these emissions varied significantly during the 24 months of consecutive operation, the emissions may be considered as irregular, cyclical, or otherwise varying significantly. Under the proposed rules, a major stationary source would be allowed to request an adjustment to its established baseline amount within 90 calendar days of completing 24 months of consecutive operation. EPA published approval for a similar approach for new major stationary sources for the HGB Failure to Attain Fee in February 2020.

All adjusted baseline amounts would be reviewed by the executive director's staff to ensure consistency with emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. Once finalized, the adjusted baseline amounts would apply starting with

the next fee assessment year. Credits or refunds for previous fee assessment years would not be processed based on the final adjustments. This ensures accounting stability for the Failure to Attain Fee.

§101.709, Adjustment of Baseline Amount for New Construction

This proposed new section would allow an existing major stationary source to adjust its baseline amount to account for new construction authorized in a nonattainment permit issued under Chapter 116, Subchapter B, Division 5. These emissions units are required to provide emissions offsets prior to construction and comply with emissions limits that achieve the lowest achievable emissions rate. The newly constructed emissions units would not have been included in the previously established baseline amount. Under the proposed rules, a major stationary source would be allowed to request an adjustment to its established baseline amount within 90 calendar days of completed construction of the new emissions units.

All adjusted baseline amounts would be reviewed by the executive director's staff to ensure consistency with emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. . Once finalized, the adjusted baseline amounts would apply starting with the next fee assessment year. Credits or refunds for previous fee assessment years would not be processed based on the final adjustments. This ensures accounting stability for the Failure to Attain Fee.

§101.710, Adjustment of Baseline Amount for Ownership Transfers

This proposed new section outlines when an established baseline amount may be adjusted because of ownership transfers. Emissions units may not always be under the same common

ownership or control. Owners or operators of major stationary sources, as part of normal business, may transfer ownership of some or all emissions units at a major stationary source or Section 185 Account to another major stationary source or Section 185 Account. The commission recognizes that a change in ownership or control of emissions units could change the Failure to Attain Fee owed for both major stationary sources or Section 185 Accounts. The change in control of emissions units does not change the historical operation, reported emissions of the emissions units, or previously invoiced amounts before the ownership transfer occurred. The ownership transfer must first be approved by and/or reported to the TCEQ Air Permits Division before adjustments of the baseline amounts could be requested.

A change in control or ownership, such as with an emissions unit transfer, would not affect the already established time period or baseline amounts on the remaining emissions units at either major stationary source or Section 185 Account. The already established baseline amounts would be transferred from one major stationary source or Section 185 Account to the other major stationary source or Section 185 Account.

In a manner similar to transferring other obligations such as emissions authorizations, the commission would allow the affected major stationary sources or Section 185 Accounts to transfer the baseline amounts and Failure to Attain Fee associated with each emissions unit having a change in control. The commission would not change the calculated baseline amounts for the transferred emissions units or remaining emissions units.

Major stationary sources that transfer ownership of equipment from one major source or Section 185 Account to a minor source(s) would not have their baseline amounts adjusted to prevent circumvention of the Failure to Attain Fee, as addressed under 30 TAC §101.3.

To qualify for an ownership transfer baseline amount adjustment, the ownership transfer must occur between major stationary sources or Section 185 Accounts of the same pollutant, or aggregated pollutants, located within the same nonattainment area. For example, if an ownership transfer occurred between a major source located in the 10-county DFW nonattainment area under the 2008 eight-hour ozone standard and the eight-hour HGB nonattainment area under the 2008 eight-hour ozone standard, then the baseline amounts could not be adjusted.

All adjusted baseline amounts would be reviewed by the executive director's staff to ensure consistency with emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. Once finalized, the adjusted baseline amounts would apply starting with the next fee assessment year. Credits or refunds for previous fee assessment years would not be processed based on the final adjustments. This ensures accounting stability for the Failure to Attain Fee.

Once finalized, the major stationary source or Section 185 Account that received the ownership-transferred emissions units would add the unaltered baseline amounts from those units to their existing major stationary source or Section 185 Account baseline amounts. There is no baseline amount adjustment for emissions units that were not ownership transferred at the originating or recipient major source. The major stationary source or Section 185 Account that transferred the emissions units would subtract the transferred emissions units' baseline amounts from their major stationary source or Section 185 Account baseline amount. While baseline amounts may increase or decrease at a major stationary source or Section 185 Account resulting from ownership transfers, the overall Area §185 Obligation for the nonattainment area would not change.

To transfer the baseline and the Failure to Attain Fee, the new owner or operator of each major stationary source or Section 185 Account affected by the change in common control would be required to submit a request to the executive director within 90 days of the ownership change for the executive director's approval.

§101.711, Adjustment of Baseline Amount for Final Emissions Inventory Data

This proposed new section addresses the situation when baseline emissions may need to be adjusted upon the availability of final quality assured and TCEQ-approved emissions inventory data. The Failure to Attain Fee would be implemented upon the effective date of EPA's finding of failure to attain notice published in the *Federal Register* for a severe or extreme ozone nonattainment area under the 2008 eight-hour ozone standard that fails to attain by the attainment date. It is unknown when EPA would issue the finding of failure to attain; therefore, the specific dates to establish an initial baseline amount are unknown. Because of implementation timing, final quality assured and TCEQ-approved emissions inventory data could occur after the baseline amount is established. If a major stationary source had used emissions inventory data to establish the baseline amount, then TCEQ may request adjustments based on the final quality assured emissions inventory data.

Additionally, major stationary sources may initiate emissions inventory revisions that require baseline amount adjustments. Due to limited staff resources, approval of regulated entity-initiated requests would be based on the revisions guidance in the Emissions Inventory Guidelines published annually and posted on the Point Source Emissions Inventory webpage located at (*https://www.tceq.texas.gov/airquality/point-source-ei/psei.html).* Emissions inventory data are used extensively for air quality planning purposes, such as SIP revisions and rule development, submitting to required federal programs, such as the NEI, and assessment of other applicable fees such as the Title V fees. For these reasons, emissions inventory revisions

are allowed for specific circumstances. Emissions inventory revisions submitted solely for the purpose of adjusting a baseline amount would not be accepted.

Regulated entities, including major sources, are provided an opportunity to review and if necessary, revise emissions data submitted for the current emissions inventory reporting year and for one year immediately prior. Major stationary sources would have 90 days or by March 31 of the calendar year immediately following the emissions inventory reporting year, whichever comes first, to submit adjusted baseline amount requests due to final, quality-assured emissions data. Revisions to historical emissions inventory data outside of this timeframe are evaluated on a case-by-case basis, usually as the result of a TCEQ-directed emissions inventory improvement project or TCEQ's compliance and enforcement process.

All adjusted baseline amounts would be reviewed by the executive director's staff to ensure consistency with final emissions information submitted to the TCEQ Air Permits Division and/or the Air Quality Division. Once finalized, the adjusted baseline amounts would apply starting with the next fee assessment year. Credits or refunds for previous fee assessment years would not be processed based on the final adjustments. This ensures accounting stability for the Failure to Attain Fee.

§101.712, Failure to Establish a Fee Baseline Amount

This proposed new section outlines the procedures for the executive director to establish a baseline amount. Timely and accurate baseline amounts are required from each applicable major stationary source to implement the FCAA-required Section 185 fee program. If a major stationary source does not submit an approvable baseline amount by the due date specified by the executive director, then the executive director would determine baseline amount(s) for that major stationary source. In accordance with the requirements of FCAA, §185, the lower of

actual emissions (reported in the emissions inventory as described in §101.705) or allowable emissions (permits or authorizations) from the attainment year (referenced as baseline year in this proposed rulemaking), would be used, if both were available, to determine separate baseline amounts for each pollutant that determined major source applicability. Since the executive director would not have sufficient information, aggregation by pollutant or sites under common control and any adjustments allowed under this proposed rulemaking would not be used.

If available, emissions inventory data reported under 30 TAC §101.10 would be used for determining the baseline emissions. However, if only permit allowable data are available, a baseline amount would be established as 12.5 tons for VOC and/or 12.5 tons for NO_x (depending on the pollutant(s) that determined major source applicability) until the major stationary source submitted an approvable baseline amount. Allowable (permits or authorizations) emissions are typically higher than the actual emissions reported in the emissions inventory. FCAA, §185 requires the lower of actual or allowable emissions, so the executive director would establish the baseline emissions from the unavailable emissions inventory as 12.5 tons, which represents one-half of the major stationary source threshold of 25 tons. If the executive director used the allowable emissions from the permit to establish the baseline amount, then the non-compliant major stationary source would gain the advantage of a higher baseline amount by not reporting their actual emissions.

If the executive director establishes the baseline amounts, then those baseline amounts would be applicable until the major stationary source submits a verifiable and complete emissions inventory according to the Emissions Inventory Requirements of 30 TAC §101.10 and baseline amount. After the major stationary source submits a baseline amount and the executive director reviews the baseline amount to ensure consistency with emissions information

submitted to the TCEQ Air Permits Division and/or the Air Quality Division, the final baseline amount would apply starting with the next fee assessment year. Adjustments to previous fee invoices based on baseline amounts established by the executive director would not be allowed.

§101.713, Failure to Attain Fee Assessment

The proposed new section outlines the method used to assess the Failure to Attain Fee (total fee) for VOC or NO_x emissions, or both. If the major stationary source is major for just one pollutant, the total fee would be assessed for just the one pollutant, VOC or NO_x. If the major stationary source is major for both VOC and NO_x emissions, the total fee would be assessed for both pollutants.

This proposed new section also provides for the total fee calculation for owners or operators of major stationary sources or Section 185 Accounts. Fee assessments must follow the same method chosen for the baseline amount determination. The total fee from VOC and/or NO_x emissions from a major stationary source that is major for one pollutant and does not have multiple sites under common control, does not choose to aggregate baseline amounts, or does not comply with the provisions of proposed §101.707 would remain separate and due from each major stationary source or Section 185 Account. The total fee for owners or operators of major stationary sources that choose to aggregate VOC and/or NO_x emissions would also be due according to the provisions of this proposed section. The aggregation of VOC with NO_x emissions may occur at one major stationary source or across multiple major stationary sources under common control. Because both pollutants were used to aggregate a baseline amount, the total fee would be due on actual emissions of both VOC and NO_x emissions. Consistency between the baseline amount determination and the total fee calculation would be maintained with this approach. An owner or operator of multiple sources under common control who chooses to combine a single pollutant from multiple major stationary sources in a

baseline amount must aggregate actual emissions of that single pollutant in the total fee payment. If an owner or operator opted to combine VOC with NO_x emissions at a major stationary source, both VOC and NO_x emissions must be aggregated for the total fee payment. Similarly, owners or operators who choose to combine VOC and NO_x emissions in a baseline amount and to aggregate those pollutants across more than one major stationary source must combine actual VOC and NO_x emissions from all aggregated major stationary sources to determine the total fee. For example, if five major stationary sources of both VOC and NO_x emissions elected to aggregate into one Section 185 fee account to determine the NO_x baseline amount, then the total NO_x portion of the fee payment would be based on all actual reported NO_x emissions from those five major stationary sources. Since the five major stationary sources did not elect to aggregate VOC emissions into one baseline amount, then the total fee payment for VOC emissions would be assessed separately for the five different Section 185 fee accounts using actual reported VOC emissions for these major stationary sources. Similarly, if owners or operators choose to combine multiple major stationary sources into one baseline amount for VOC and NO_x emissions, then the total fee payment would be due from the combined major stationary sources for both pollutants together.

The total fee would be applicable to and calculated for each pollutant (VOC or NO_x) for which the major source meets the applicability requirements of this proposed rulemaking from the actual emissions reported in the emissions inventory for the fee assessment year. The fee amount assessed, calculated, and invoiced would be based on the actual emissions from the fee assessment year's emissions inventory that exceeded 80% of the baseline amount, rounded up to the nearest whole number. If the actual emissions reported in the emissions inventory are less than 80% of the baseline amount, then the fee would be assessed at $0.00 dollars and no fee payment would be due from that major stationary source or Section 185 Account for that fee assessment year for that pollutant. For future fee assessment years, the fee would be due if

the actual emissions reported in the emissions inventory exceeded 80% of the baseline amount.

Rounding up to the nearest whole number is standard practice for fee assessment since assessing fees on fractional amounts creates fee amounts with several decimal places that can cause errors in the fee invoice data systems, which accept only two decimal places. An example of rounding up to the nearest whole number would be the fee assessment amount calculated as 10.0319 tons, rounding up to the nearest whole number, the fee would be assessed and invoiced on 11 tons.

The total fee for a pollutant aggregated under multiple major stationary sources for a baseline amount would be calculated based on the aggregated actual emissions from all the affected major stationary sources minus 80% of the aggregated baseline amounts for all major stationary sources, rounded up to the nearest whole number.

While baseline amounts exclude unauthorized emissions, fee assessments would be based on actual emissions, as defined in 30 TAC §101.10, which includes emissions from annual routine operations, MSS operations, and other events not otherwise authorized (emissions from emissions events or MSS activities). Inclusion of unauthorized emissions in fee assessment is appropriate because the emissions contribute to the formation of ozone in the nonattainment area during the year that the fee is owed. Inclusion of unauthorized emissions in fee assessment is also required in TCEQ's emissions fee rule in 30 TAC §101.27, which requires all MSS and emissions event emissions to be included in fee calculations.

FCAA, §185 requires the annual fee to be adjusted by the consumer price index (CPI) and cross references the methodology in FCAA, §502(b)(3)(B)(3)(v). The method described in FCAA, §502 requires the fee to be adjusted annually per the CPI for all-urban consumers published by the

United States Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year. FCAA, §185 requires these fees to be assessed on a calendar-year basis, and the inflation factor based on the CPI is applied in September for the fiscal year (based on the previous September through August data). Therefore, the calendar year Failure to Attain Fee is determined as a weighted monthly average (two thirds of the fee associated with January through August and one third of the fee associated with September through December). For example, a 2028 calendar-year fee would span the 2028 fiscal year and the 2029 fiscal year. Thus, a calendar-year 2028 fee requires two thirds of the annual CPI ending in August 2028 and one third of the annual CPI ending in August 2029. The commission proposes this methodology to calculate the fee from EPA's guidance memo (Page 10, available at (*https://www.epa.gov/sites/default/files/2015-09/documents/1hour_ozone_nonattainment_guidance.pdf*). The proposed fee calculation uses the 40 CFR Part 70 Presumptive Minimum fee basis from EPA's guidance memo. The Part 70 fee rate is published annually by EPA and is available at (*https://www.epa.gov/title-v-operating-permits/permit-fees*). The Part 70 fee is the rate used to calculate emissions-based fees for Part 70 permit programs. Rather than calculating the rate directly from the CPI, the proposed method uses the Part 70 fee rate published by EPA. The Part 70 fee already has the required CPI adjustment incorporated into it.

The timing of the fee assessment depends on the effective date of EPA's finding of failure to attain. For the 10-county DFW and eight-county HGB 2008 eight-hour ozone nonattainment areas, 2028 is the first year after the attainment date of July 20, 2027. Since the 2027 emissions inventories would be due in 2028, TCEQ staff would have until the end of 2028 to complete the quality assurance reviews of the 2027 annual emissions inventories that would be used to determine the baseline amount. Major sources would require time to establish the baseline amounts based on final emissions reported in the 2027 emissions inventory. TCEQ staff would

require time to quality assure the baseline amounts submitted by each major source. To establish and quality assure the baseline amounts, the fee collection year would generally be proposed as two calendar years following the fee assessment year. A potential scenario could include regulated entities submitting the 2027 emissions inventories by the March 31, 2028, due date, and TCEQ staff completing the quality assurance reviews of the 2027 emissions inventories by the end of calendar year 2028. If the area(s) fail to attain the 2008 eight-hour ozone standard, and EPA finalizes a failure to attain notice in October 2027, then, following EPA's effective date of the failure to attain notice, TCEQ could provide a courtesy electronic notification to regulated entities that major sources must submit their baseline amount to TCEQ by March 31, 2028. TCEQ staff would quality assure the 2027 baseline amounts during calendar year 2028. The 2028 emissions inventories are due by April 2, 2029 (since March 31, 2029, falls on a Saturday), and TCEQ staff would complete the quality assurance process for the 2028 emissions inventories by the end of calendar year 2029. TCEQ would implement the calendar-year 2028 Section 185 fee rate once EPA publishes it, typically by the end of October each year. Assuming EPA publishes the 2028 Section 185 fee rate in October 2028, TCEQ would then assess the calendar-year 2028 fees in late 2029 and prepare and send invoices in early calendar-year 2030. As a result, calendar year 2030 becomes the first fee collection year for the first fee assessment year of 2028, based on the actual emissions reported in the 2028 emissions inventory.

A major stationary source subject to the requirements of this proposed rulemaking would also be required to submit an annual emissions inventory according to §101.10. The annual fee assessment requires the submission of the emissions inventory by the due date to invoice the source on actual emissions of VOC, NO_x, or both for that fee assessment year. Regulated entities subject to the Section 185 fee that do not submit an emissions inventory by the due date would be subject to enforcement.

§101.714, Failure to Attain Fee Payment

This proposed section stipulates that payment of the Failure to Attain Fee must be made by check, certified check, electronic funds transfer, or money order made payable to TCEQ. Payment must be sent to the TCEQ address provided on the billing statement by the date specified on the invoice. Generally, sites will have a minimum of 30 days to pay the invoice.

This proposed rule would impose interest and penalties in accordance with 30 TAC Chapter 12 to owners or operators of major sources subject to the applicability provisions of this proposed subchapter who fail to make full payment of the Failure to Attain Fees by the due date.

§101.715, Eligibility for Other Failure to Attain Fee Fulfillment Options

This proposed new section would allow major stationary sources or Section 185 Accounts required to pay a Failure to Attain Fee (total fee) to partially or completely fulfill the total fee owed by relinquishing emissions credits or using Supplemental Environmental Projects (SEPs) instead of issuing full payment. These other fulfillment options could be considered individual fee offsets for major stationary sources or Section 185 Accounts. The amount of emissions tonnage upon which the total fee is owed or the total fee amount owed would be reduced for the major stationary source or Section 185 Account while the nonattainment area receives emissions reductions benefits. If relinquishing emissions credits or using SEPs does not completely fulfill the entire fee owed by a major stationary source or Section 185 Account, the remaining portion of the total fee remains due according to the Failure to Attain Fee Payment section of this proposed rulemaking.

As explained previously in this preamble, the implementation of the Section 185 fee program depends on several future factors including the effective date of EPA's finding of failure to

attain action. According to proposed §101.714, the invoice due date would be provided by the executive director after the program is implemented. The commission must be timely informed if other options would be requested to fulfill the total fee. The commission proposes that the emissions inventory due date specified under the Emissions Inventory Requirements of 30 TAC §101.10 for the fee assessment year would be the proposed date that major stationary sources or Section 185 Account must inform the executive director that these other fulfillment options would be used. Further, the commission proposes that the emissions inventory due date specified under the Emissions Inventory Requirements of 30 TAC §101.10 for the fee assessment year would be the proposed date allowances traded under §101.716 must be approved and completed, and SEPs, under §101.717, must be approved and funded. If other fulfillment options under §101.716 are not approved and funded, exercised, or otherwise completed by the emissions inventory due date, these other fulfillment options would not be eligible to be applied to the total fee. Because a SEP may be a capital project requiring more than 30 days to complete, SEPs must be approved and funded by the emissions inventory due date. All requests to use a SEP as the other option to fulfill the total fee would be subject to the executive director's approval to ensure applicability to the nonattainment area.

§101.716, Relinquishing Credits to Fulfill a Failure to Attain Fee

This proposed new section allows major stationary sources or Section 185 Accounts to request to fulfill all or a portion of their Failure to Attain Fee (total fee) by relinquishing an equivalent portion of emission reduction credits, discrete emission reduction credits, current or banked Highly-Reactive Volatile Organic Compound (HRVOC) Emissions Cap and Trade (HECT) program allowances, or current or banked Mass Emissions Cap and Trade (MECT) program allowances.

Emission credits submitted for total fee reduction purposes, on a ton-for-ton basis, would only be allowed for use as a fulfillment option for the pollutant (VOC or NO_x) specified on the credit.

VOC credits or HECT allowances must only be used as a fulfillment option for VOC tons in excess of the baseline; NO_X credits must only be used as a fulfillment option for NO_X tons. The use of allowances would be similarly restricted such that MECT allowances would only be used as an equivalent for NO_X tons. HECT allowances would only be allowed for use as an equivalent for VOC tons in excess of the baseline amount for major stationary sources or Section 185 Accounts located in the 2008 eight-hour ozone nonattainment area. Significant digit rounding of the emissions reduction must be limited to one-tenth of a ton. Removing these emissions, represented as allowances, on a ton-per-ton basis furthers the goals of reducing ozone-causing emissions in the atmosphere and meets the objective of improving air quality by reducing emissions more directly than imposing a fee.

§101.717, Using a Supplemental Environmental Project to Fulfill a Failure to Attain Fee

This proposed new section allows major stationary sources or Section 185 Accounts to request to fulfill all or part of their Failure to Attain Fee (total fee) by contributing to a SEP within the 2008 eight-hour ozone nonattainment area where the major stationary source or Section 185 Account is located. SEPs are projects that prevent or reduce pollution beyond existing regulatory requirements. Supporting a SEP guaranteeing emissions reductions in the nonattainment area would provide cost-effective opportunities that more directly benefit air quality in the affected area than the imposition of a fee. Under this proposed rule, contributing to a SEP would reduce a major stationary source's or Section 185 Account's Failure to Attain Fee on a dollar-per-dollar or ton-by-ton basis. As proposed, the rule would also allow a major stationary source or Section 185 Account to use surplus SEP funds from year to year. The funding would not be discounted or depreciated over time.

The proposed rule language would only allow funding for air-related projects that are implemented within the same 2008 eight-hour ozone nonattainment area. For example, in the

10-county DFW nonattainment area under the 2008 eight-hour ozone standard, SEPs are restricted to fulfillment options for major stationary sources or Section 185 Accounts located in the DFW nonattainment area. This rule would restrict SEPs to projects that offset the Failure to Attain Fee on a dollar-per-dollar or ton-by-ton basis. The established SEP program requires participants to submit quarterly and annual project reports with expenditure and project completion information, providing validation of actual emissions reductions or expenditures.

Because a SEP can be used to offset an administrative penalty, it is inappropriate for those funds to also be used for credit or offset for the Failure to Attain Fee. For many SEPs, only half the dollar amount of the SEP may be used to offset an administrative penalty. The use of Failure to Attain Fee credit from the SEP would be restricted to be the portion of funds not used to offset an administrative penalty. The SEP must also be enforceable through an Agreed Order or other enforceable document to ensure compliance with the SEP objectives.

§101.718, Cessation of Program

This proposed new section outlines the circumstances that would end the Failure to Attain Fee for an applicable nonattainment area. FCAA, §185 requires the penalty fee to be collected until redesignation of the nonattainment area to attainment by EPA, any final action or final rulemaking by EPA to end the Failure to Attain fee, or a finding of attainment by EPA. After EPA redesignates an area to attainment and publishes the final approval of the attainment redesignation in the *Federal Register*, the Failure to Attain Fee would no longer be applicable to that ozone nonattainment area as of the effective date specified in the *Federal Register*.

Additionally, to provide for timely cessation of the Failure to Attain Fee program, the commission proposes that the Failure to Attain Fee would be assessed, but the fee collection would be placed in abeyance by the executive director if three years of quality-assured data

resulting in a design value that did not exceed the 2008 eight-hour ozone standard are submitted to EPA. The commission also proposes as part of this design value determination, the ability to exclude days that exceeded the 2008 eight-hour ozone standard because of exceptional events or emissions emanating outside the United States.

Fiscal Note: Costs to State and Local Government

Kyle Girten, Analyst in the Budget and Planning Division, has determined that for the first five-year period the proposed rules are in effect, fiscal implications may result for TCEQ and other units of government during implementation of the proposed rule.

If DFW and/or HGB areas do not attain the 2008 eight-hour NAAQS by July 20, 2027 or EPA does not abolish the program, these areas would be subject to the Section 185 fee in the proposed rulemaking (30 TAC Subchapter K. If this is the case, TCEQ currently estimates it would require the addition of three full-time-equivalents (FTEs) beginning in FY 2028 and for the update and maintenance of a database for tracking information as applicable to TCEQ's 185 fee program. It is anticipated that the three FTEs would include a Natural Resources Specialist (NRS) V (B24) and two NRS IVs (B22) in years 3 and 4 (FY 2028 and FY 2029), and two FTEs (one NRS V and one NRS IV) in year 5 (FY 2030) as necessary to implement the program. These staff would develop and implement business processes for (1) establishing and maintaining a fee equivalency account (§§101.703-704), (2) establishing baseline determinations using data submitted by regulated entities (§§101.705-712), (3) annually assessing and collecting fees based on data from annual emissions inventories (§§101.713-714), (4) reviewing and assessing fee payments (§§101.715-717), and (5) updating and maintaining the database for the program. The total cost for FTEs, including salaries and other costs, but excluding fringe and payroll costs is estimated at $277,818 in FY 2028, $252,318 in FY 2029, and $171,920 in FY 2030. It is

estimated that $250,000 will be needed annually for the update of the Section 185 database in FY 2028 and FY 2029, and $50,000 would be needed in FY 2030. In summary, it is anticipated there will be no costs to TCEQ during the first two years the rules are in effect, and the total cost to TCEQ is estimated at $527,818 in FY 2028, $502,318 in FY 2029, and $221,920 in FY 2030.

TCEQ may receive revenue from fees that may be required of entities that include major stationary sources of VOC and/or NO_x emissions in these areas. Whether fees will ultimately be assessed as a result of this rulemaking is dependent on how baselines are determined for the HGB and DFW sources (§§101.705-712), actual emissions for each year when fees are assessed (§§101.713-714), the amount of TERP revenue in these areas that is eligible to offset fee obligations (§§101.703-704), whether and to what extent equivalent alternatives are used in lieu of fee payments (§§101.715-717), and the unit cost per ton of VOC and/or NO_x emissions billed as required by FCAA, §182(d)(3) and (e) and §185.

It is noted that when the Section 185 fee program was implemented for the HGB one-hour ozone severe nonattainment area for major sources of VOC and/or NO_x emissions, TERP revenue was sufficient to offset all fee obligations every year fees were required to be assessed (calendar years 2012-2019), and TCEQ did not invoice fees during this timeframe. For this rulemaking, TCEQ estimates that between $0 - $129,000,000 in revenue will be received annually during the third, fourth, and fifth years after the proposed rules are in effect.

This estimate was derived using the 2023 fee rate from EPA ($11,922 per ton VOC and/or NO_x) adjusted to increase by an assumed inflation rate of 2.5% between 2023 and 2028. For DFW, revenue received by TCEQ is estimated to be between $0 - $5,000,000 each year starting in 2028, assuming TCEQ receives the lowest amount of eligible TERP revenue for this area in the

past ten years ($42,000,000). For HGB, revenue received is estimated to be between $0 - $124,000,000, assuming TCEQ receives the lowest amount of eligible TERP revenue for this area in the past ten years ($47,000,000).

Fiscal implications for other governmental entities would be dependent on whether fees need to be assessed for major stationary sources in the DFW and/or HGB areas. Affected entities include major stationary sources of VOC and/or NO_x emissions in these areas. In the DFW area, it is estimated that eight landfills, one university, and one sewage facility are governmental entities that would meet eligibility requirements. In HGB, it is estimated that six landfills, two universities, one research facility, and four sewage facilities would meet eligibility requirements Entities for DFW and/or HGB would be required to submit baseline information for VOC and/or NO_x, and prorated based on TERP offsets, they would be responsible for pay the annual Section 185 fee or apply equivalent alternatives based on their actual emissions over baseline amounts.

Public Benefits and Costs

Mr. Girten determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated will be compliance with federal law. If this rulemaking were not to occur, in accordance with FCAA, §185(d), EPA would have the ability to impose and collect the fee with interest, and this revenue would not be returned to the state. Additionally, although the Section 185 fee is a penalty and not a control strategy, the magnitude of the fee could potentially incentivize major stationary sources to reduce ozone precursor emissions in the DFW and/or HGB nonattainment areas.

This rulemaking may have fiscal impacts on 461 major stationary sources, including the 23 governmental sources noted above. These sources are from a range of industrial source categories, with the most common categories being industrial organic chemicals, crude

petroleum and natural gas, electric services, petroleum bulk stations and terminals, special warehousing and storage, natural gas liquids, plastic materials and synthetic resins, refuse systems, refined petroleum pipelines, petroleum refining, industrial gases, and natural gas transmission. As noted above, the fee per sources is dependent on multiple factors, and the total impact for DFW and HGB areas could range from $0 - $129,000,000 annually during the third, fourth, and fifth years after the proposed rules are in effect.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking is not anticipated to adversely affect a local economy in a significant way for the first five years that the proposed rule is in effect. While the magnitude of fees assessed has the potential to be high in the DFW and HGB areas, the number of businesses and governmental entities affected is very small in proportion to the overall number of industries and business and governmental entities in these areas. It is unknown whether and to what extent this rulemaking would affect business decisions made by entities directly affected by this rule.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. This rulemaking applies to DFW and HGB areas, which are areas with large populations; therefore, rural communities are not significantly impacted.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the

implementation or administration of the proposed rule for the first five-year period the proposed rules are in effect. No small businesses have been identified that would be affected by this rulemaking.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and may require a request for an increase in future legislative appropriations to the agency. The proposed rulemaking is anticipated to require the creation of new employee positions, and it may increase fees paid to the agency. The proposed rulemaking establishes a new regulation, with major sources of VOC or NO_x emissions in the DFW and/or HGB areas subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's economy, particularly if TERP revenue is sufficient to offset the Section 185 fee obligation.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking considering the regulatory impact analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rulemaking does not meet the definition of a "Major environmental rule" as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to

prepare a regulatory impact analysis. A “Major environmental rule” means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Additionally, the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a “Major environmental rule”, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, § 2001.0225 applies only to a “Major environmental rule”, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The specific intent of the proposed rules is to comply with the requirements of 42 U.S.C. §7511a and §7511d (FCAA, §182 and §185) for the DFW and HGB 2008 ozone nonattainment areas, as discussed further elsewhere in this preamble. Penalty fee programs are a required component of SIPs for ozone nonattainment areas that are classified as severe or extreme. Fees are required to be collected for all major stationary sources in severe or extreme ozone nonattainment areas that do not attain the ozone standard by their attainment dates. If the fee is not imposed and collected by the state, then 42 U.S.C. §7511d(d) (FCAA, §185(d)) requires that the EPA shall impose and collect the fee (and may collect interest). The applicability of the fee may have a benefit in reducing emissions of ozone precursors in ozone nonattainment areas by incentivizing sources to reduce emissions further, but the proposed rules will not require emission reduction.

States are required to adopt State Implementation Plans (SIPs) with enforceable emission limitations and other control measures, means, or techniques, as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the FCAA. As discussed in the FISCAL NOTE portion of this preamble, the proposed rules are not anticipated to add any significant additional costs to affected individuals or businesses beyond what is necessary to comply with federal law on the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. If a state does not comply with its obligations under 42 USC, §7410 (FCAA, §110) to submit SIPs, states are subject to discretionary sanctions under 42 USC, §7410(m) (FCAA, §110(m)) or mandatory sanctions under 42 USC, §7509 (FCAA, §179); as well as the imposition of a federal implementation plan (FIP) under 42 USC, §7410 (FCAA, §110(c)).

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th legislative session. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was

a major environmental rule that exceeds a federal law. Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis contemplated by SB 633. Requiring a full regulatory impact analysis for all federally required rules is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the proposed rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and in fact creates no additional impacts since the proposed rules do not impose burdens greater than required to comply with federal law, as discussed elsewhere in this preamble. For these reasons, the proposed rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law. The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (Central Power & Light Co. v. Sharp, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); Bullock v. Marathon Oil Co., 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). Cf. Humble Oil & Refining Co. v. Calvert, 414 S.W.2d 172 (Tex. 1967); Dudney v. State Farm Mut. Auto Ins. Co., 9 S.W.3d 884, 893 (Tex. App. Austin 2000);

Southwestern Life Ins. Co. v. Montemayor, 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and Coastal Indust. Water Auth. v. Trinity Portland Cement Div., 563 S.W.2d 916 (Tex. 1978).) The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA applying the standard of "substantial compliance" specified in Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard.

As presented in this analysis and elsewhere in this preamble, the evidence supports the conclusion that the commission has substantially complied with the requirements of Texas Government Code, §2001.0225. The proposed rules implement the requirements of the FCAA as discussed in this analysis and elsewhere in this preamble. The proposed rules were determined to be necessary to comply with federal law and will not exceed any standard set by state or federal law. These proposed rules are not an express requirement of state law. The proposed rules do not exceed a requirement of a delegation agreement or a contract between state and federal government, as the proposed rules, if adopted by the commission and approved by EPA, will become federal law as part of the approved SIP required by 42 U.S.C. §7410 (FCAA, §110). The proposed rules were not developed solely under the general powers of the agency but are authorized by specific sections of Texas Health and Safety Code (THSC), Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.011, 382.012, and 382.017. Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invites public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect. The commission completed a takings impact analysis for the proposed rulemaking action under the Texas Government Code, §2007.043.

The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to meet federal requirements for the inclusion of penalty fee programs for major stationary sources in State Implementation Plans (SIPs) as mandated by 42 United States Code (USC), §§7410, 7511a, and 7511d (Federal Clean Air Act (FCAA), §§110, 182 and 185). Penalty fee programs are a required component of SIPs for ozone nonattainment areas that are classified as severe or extreme. Fees are required to be collected for all major stationary

sources in severe or extreme ozone nonattainment areas that do not attain the ozone standard by their attainment dates. If the fee is not imposed and collected by the state, then 42 U.S.C. §7511d(d) (FCAA, §185(d)) requires that the EPA shall impose and collect the fee (and may collect interest). The applicability of the fee may have a benefit in reducing emissions of ozone precursors in ozone nonattainment areas by incentivizing sources to reduce emissions further, but the proposed rules will not require emission reduction.

States are required to adopt SIPs with enforceable emission limitations and other control measures, means, or techniques, as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the FCAA. If a state does not comply with its obligations under 42 USC, §7410 (FCAA, §110) to submit SIPs, states are subject to discretionary sanctions under 42 USC, §7410(m) (FCAA, §110(m)) or mandatory sanctions under 42 USC, §7509 (FCAA, §179); as well as the imposition of a federal implementation plan (FIP) under 42 USC, §7410(c) (FCAA, §110(c)).

The proposed rules will not create any additional burden on private real property beyond what is required under federal law, as the proposed rules, if adopted by the commission and approved by EPA, will become federal law as part of the approved SIP required by 42 U.S.C. §7410 (FCAA, §110). The proposed rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the commission concludes that the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the amendments are consistent with CMP goals and policies because the rulemaking is a fee rule, which is a procedural mechanism for paying for commission programs; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendments will not violate (exceed) any standards identified in the applicable CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 101, Subchapter K would not require revisions to existing Federal Operating Permits under 30 TAC §122, Federal Operating Permits Program.

Announcement of Hearing

The commission will hold a virtual public hearing on this proposal on June 12, 2025, at 2:00 p.m. via virtual platform such as Microsoft Teams. The hearing is structured for the receipt of oral comments by the public. Individuals may register to provide oral comments and may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Individuals who plan to attend the hearing virtually and want to provide oral comments and/or

want their attendance on record must register by June 5, 2025, for the June 12, 2025, hearing. To register for the hearing, please email *Rules@tceq.texas.gov* and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent by June 6, 2025, for the June 12, 2025, hearing to those who register for the hearing.

Members of the public who do not wish to provide oral comments but would like to view the hearing may do so at no cost at:
https://events.teams.microsoft.com/event/589ff6dc-dcbe-4ce9-ae8c-45a18864e652@871a83a4-a1ce-4b7a-8156-3bcd93a08fba

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov*. Electronic comments may be submitted at: *https://tceq.commentinput.com/comment/search.* File size restrictions may apply to comments being submitted via the TCEQ Public Comments system. All comments should reference Rule Project Number 2023-131-101-AI. The comment period opens on May 6, 2025, and closes on June 18, 2025. Please choose one of the methods provided to submit your written comments.

Copies of the proposed rulemaking can be obtained from the commission's website at

https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact

Jill Dickey-Hull, Emissions Assessment Section, 512-239-5912, and 185Rule@tceq.texs.gov.

SUBCHAPTER K: FAILURE TO ATTAIN FEE FOR THE 2008 EIGHT-HOUR OZONE STANDARD

§101.700 – 101.718

Statutory Authority

The new sections are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act.

The new sections are also proposed under TWC, §5.701, concerning Fees, that authorizes the commission to charge and collect fees prescribed by law; TWC, §5.702, concerning Payment of Fees Required When Due, that requires fees to be paid to the commission on the date the fee is due; TWC, §5.703, concerning Fee Adjustments, that specifies that the commission shall not consider adjusting the amount of a fee due if certain conditions are met; TWC, §5.705, concerning Notice of Violation, that authorizes the commission to issue a notice of violation to a person required to pay a fee for knowingly violating reporting requirements or calculating the fee in an amount less than the amount actually due; and TWC, §5.706, concerning Penalties and Interest on Delinquent Fees, that authorizes the commission to collect penalties for delinquent fees due to the commission. The new sections are also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission’s purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the

commission to control the quality of the state's air; and THSC, §382.012, concerning the State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; and THSC, §382.0622, concerning Clean Air Act Fees, specifying that any fees collected as required by Federal Clean Air Act (FCAA), §185 are clean air act fees under the THSC. The new sections are also proposed to comply with FCAA, 42 United States Code (USC), §7511a(d)(3), (e), and (f) (FCAA, §182(d)(3), (e), and (f)) regarding Plan Submissions and Requirements for ozone nonattainment plan revisions; and 42 USC, §7511d (FCAA, §185) regarding Enforcement for Severe and Extreme ozone nonattainment areas for failure to attain.

The proposed new sections implement the requirements of THSC, §§382.002, 382.011, 382.012, 382.017 and 382.0622; TWC, §§5.102, 5.103, 5.105, 5.701 - 5.703 and 5.705 – 5.706; as well as FCAA, 42 USC, §7511a(d)(3), (e), and (f) and §7511d (FCAA, §182(d)(3), (e), and (f), and §185).

§101.700. Definitions.

The following terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise.

(1) Actual emissions--As defined in §101.10 of this title (relating to Emissions Inventory Requirements).

(2) Area §185 Obligation--The total annual amount of Failure to Attain Fees due from all applicable major stationary sources or Section 185 Accounts in a severe or extreme ozone nonattainment area that failed to attain the 2008 eight-hour ozone National Ambient Air Quality Standard by its applicable attainment date.

(3) Attainment date--The U.S. Environmental Protection Agency-specified date that a severe or extreme nonattainment area must attain the 2008 eight-hour ozone National Ambient Air Quality Standard.

(4) Baseline amount--Tons of volatile organic compounds and/or nitrogen oxides emissions calculated separately at a major stationary source, using data submitted to and reviewed the executive director. The baseline amount is the lower of baseline emissions (actual emissions) or total annual authorizations or pending authorizations emissions at a major stationary source during the baseline year or timeframe as otherwise specified under this subchapter.

(5) Baseline emissions--Emissions reported in tons in the annual emissions inventory submitted to and recorded by the agency each calendar year per the requirements of §101.10 of this title. The emissions must include all annual routine emissions associated with authorized normal operations, which includes reported emissions from authorized maintenance, startup, and shutdown activities and excludes all unauthorized emissions. The timeframe options are as follows:

(A) reported emissions from the baseline year; or

(B) reported emissions as an average of any single consecutive 24-month period as allowed under §101.705(b)(2) of this title (relating to Baseline Amount) for major stationary sources with emissions that are irregular, cyclic, or otherwise vary significantly from year to year.

(6) Baseline year--The baseline year is January 1 through December 31 of the calendar year that contains the attainment date unless otherwise specified in this subchapter.

(7) Electric utility steam generating unit--As defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions).

(8) Emissions unit--As defined in §101.1 of this title (relating to Definitions).

(9) Equivalency credits--An amount equivalent to the revenue collected in accordance with §101.703 of this title (relating to Fee Equivalency Account) for accumulation in the Fee Equivalency Account.

(10) Extension year--A year as defined in FCAA §181(a)(5).

(11) Failure to Attain Fee--The fee assessed and due from each major stationary source or Section 185 Account based on actual emissions whether authorized or unauthorized of volatile organic compounds, nitrogen oxides, or both pollutants that exceed 80% of the baseline amount.

(12) Fee assessment year--Calendar year used to calculate and assess the Failure to Attain Fee under the provisions of this subchapter.

(13) Fee collection year--Calendar year in which the Failure to Attain Fee is invoiced.

(14) Major stationary source--As defined under §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions).

(15) Section 185 Account--The TCEQ-assigned account number for one major stationary source or a group of two or more major stationary sources under common control located within the same severe or extreme 2008 eight-hour ozone National Ambient Air Quality Standard nonattainment area.

§101.701. Applicability.

(a) The provisions of this subchapter will become applicable in an area classified as severe or extreme under the 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) when the U.S. Environmental Protection Agency (EPA) determines that the area has failed to attain the standard by its applicable severe or extreme attainment date. The determination will be the effective date of EPA's finding of failure to attain notice published in the Federal Register.

(b) Except as otherwise provided in §101.702 of this title (relating to Exemption), the provisions of this subchapter apply to all regulated entities that meet the definition of major stationary sources of volatile organic compounds or nitrogen oxides located in a nonattainment area classified as severe or extreme for the 2008 eight-hour ozone standard.

§101.702. Exemption.

No source subject to the Failure to Attain Fee under this subchapter is required to remit the fee during any calendar year for which the U.S. Environmental Protection Agency has

finalized an extension of the attainment date for the nonattainment area applicable to the source under the 2008 eight-hour ozone National Ambient Air Quality Standard.

§101.703. Fee Equivalency Account.

(a) Fee Equivalency Account. The executive director will establish and maintain a Fee Equivalency Account to document revenue collected and available for use in demonstrating equivalency with the Area §185 Obligation. No actual money will be deposited into the Fee Equivalency Account. The Fee Equivalency Account will reflect equivalency credits based upon revenue collected and made available for programs of the Texas Emissions Reduction Plan (TERP) under authority of the Texas Health and Safety Code, Chapter 386.

(b) Revenue eligibility. The revenue eligible for credits to the Fee Equivalency Account must be from the severe or extreme 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) nonattainment area and cannot be transferred between nonattainment areas.

(c) Revenue credited. The revenue credited to the Fee Equivalency Account will be credited for the years TERP funding is expended in a severe or extreme 2008 eight-hour ozone standard nonattainment area beginning with the first fee assessment year until the Failure to Attain Fee no longer applies to the nonattainment area as described under §101.718 of this title (relating to Cessation of Program).

(d) Other revenue sources. The executive director may credit revenue from other emissions reductions grant programs as funds become available. The executive director will apply revenue from such grant programs to the Fee Equivalency Account according to the

requirements of this section and §101.704 of this title (relating to Fee Equivalency Accounting).

§101.704. Fee Equivalency Accounting.

(a) Fee Equivalency Account credits. Equivalency Credits will be on a dollar-for-dollar basis and will not be discounted due to the passage of time. Equivalency Credits can be accumulated in the Fee Equivalency Account from year to year if a surplus exists in any given year and used to offset the Area §185 Obligation determination.

(b) Area §185 Obligation determination. Annually, the executive director will calculate the applicable Area §185 Obligation for all major stationary sources or Section 185 Accounts in a severe or extreme 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) nonattainment area by summing the Failure to Attain Fee for each major stationary source or Section 185 Account. The summed amount will represent the calendar year Area §185 Obligation for the severe or extreme 2008 eight-hour ozone standard nonattainment area. The annual Area §185 Obligation will be calculated using actual emissions reported under §101.10 of this title (relating to Emissions Inventory Requirements) for the fee assessment year.

(c) Annual demonstration of equivalency. The executive director will annually determine the amount of equivalency credits available in the Fee Equivalency Account to determine the Area §185 Obligation calculated under this subsection. This demonstration will continue annually until the 2008 eight-hour ozone standard nonattainment area is no longer subject to the fee according to the provisions of §101.718 of this title (relating to Cessation of the Program).

(1) The annual determination of equivalency will be calculated as follows.

Figure: 30 TAC §101.704(c)(1)

$$FeeBalance = AreaObligation - FeeEquivAcct$$

Definitions:

AreaObligation = The Area §185 Obligation calculated under subsection (c) of this section representing the sum of the Failure to Attain Fee from all major stationary sources or Section 185 Accounts in the severe or extreme 2008 eight-hour ozone standard nonattainment area for a fee assessment year.

FeeEquivAcct = Amount of Equivalency Credits in the Fee Equivalency Account as determined under §101.703 of this title (relating to Fee Equivalency Account).

FeeBalance = The balance (amount remaining) in the Fee Equivalency Account after the Equivalency Credits are applied to the Area §185 Obligation for a fee assessment year.

(2) If the Fee Equivalency Account balance is calculated to be less than or equal to zero in paragraph (1) of this subsection, sufficient equivalency credits were available to offset the Area §185 Obligation. The executive director will not assess a Failure to Attain Fee on major stationary sources or Section 185 Accounts for the fee assessment year.

(3) If the Fee Equivalency Account balance is calculated to be greater than zero in paragraph (1) of this subsection, insufficient equivalency credits were available to offset the fee obligation. The executive director will annually assess a sufficient Failure to Attain Fee to fulfill

the Area §185 Obligation. The amount due from each major stationary source or Section 185 Account will be prorated to generate sufficient revenue to meet the Area §185 Obligation. The prorated fee will be calculated as follows.

Figure: 30 TAC §101.704(c)(3)

$$ProratedFee = \left(\frac{FeeBalance}{AreaObligation}\right) \times (\text{§185Fee})$$

Definitions:

FeeBalance = The balance (amount remaining) in the Fee Equivalency Account after the Equivalency Credits are applied to the Area §185 Obligation for a fee assessment year.

AreaObligation = The Area §185 Obligation calculated under this subsection for the fee assessment year.

§185Fee = The Failure to Attain Fee for each individual major stationary source or Section 185 Account calculated by the executive director based on actual emissions recorded in the inventory under §101.10 of this title (relating to Emissions Inventory Requirements).

ProratedFee = The reduced Failure to Attain Fee each major stationary source or Section 185 Account to be assessed if insufficient equivalency credits are available in the Fee Equivalency Account.

§101.705. Baseline Amount.

(a) Baseline amount. For the purposes of this subchapter, the baseline amount must be calculated as the lower of the following:

(1) total amount of baseline emissions; or

(2) total annual emissions allowed under authorizations, including authorized emissions from maintenance, shutdown, and startup activities, applicable to the source in the baseline year. Emissions from pending authorizations with administratively complete applications as of December 31 of the baseline year may be included in the total annual emissions allowed under authorizations.

(b) Baseline emissions. For the purposes of this subchapter, the baseline emissions must be calculated from:

(1) the baseline year; or

(2) a historical period, if the major stationary source's or Section 185 Account's emissions are irregular, cyclical, or otherwise vary significantly from year to year. Any single 24-month consecutive period within a historical period preceding January 1 of the baseline year may be used to calculate an average baseline emissions amount in tons per year for the major stationary source as the historical period. If used, the historical period must be:

(A) ten years for non-electric utility steam generating units; or

(B) five years for electrical utility steam generating units.

(c) Historical period. If a major stationary source or Section 185 Account uses a historical period as defined in subsection (b)(2) of this section, the baseline amount will:

(1) use adequate data for calculating the equivalent alterative fee baseline emissions;

(2) be adjusted downward to exclude any unauthorized emissions that occurred while the source was operating above an emissions limitation that was legally enforceable during the consecutive 24-month period; and

(3) be adjusted downward to exclude any emissions during the consecutive 24-month period that would have exceeded an emissions limitation for rules and regulations with which the source had to comply during the baseline year.

(d) Adjustments. The baseline amounts must be adjusted downward to exclude any emissions that exceeded an emissions limit for rules or regulations in effect by December 31 of the baseline year.

(e) Emissions units. Baseline amounts must include all emissions units located at the major stationary source as of December 31 of the baseline year. When control or ownership of emission units changes during the baseline year, the emissions from those emission units will be attributed to the major stationary source with control or ownership of the emissions unit on December 31 of the baseline year.

(f) Calculations. A baseline amount, reported in units of tons per year, must be calculated separately for each pollutant, volatile organic compounds and/or nitrogen oxides, for which the source meets the major source applicability requirements of §101.701 of this title (relating to Applicability).

(g) Compliance schedule. The owner or operator of each major stationary source meeting the requirements of §101.701 of this title must submit to the executive director a report establishing its baseline amount on a form published by the executive director. The baseline amounts forms must be submitted by the emissions inventory due date as specified under §101.10 of this title (relating to Emissions Inventory Requirements) for the fee assessment year, or 120 days after the effective date of a finding of failure to attain, whichever is later.

(h) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title or total annual authorized emissions. After review, the baseline amount will be fixed and not be changed except as allowed under this subchapter.

§101.706. Baseline Amount for New Major Stationary Sources.

(a) Baseline amounts. A baseline amount must be established for major stationary sources or Section 185 Accounts that begin operating during or after the baseline year. The baseline amount must use the first full year operation as major source and be the lower of:

(1) total amount of baseline emissions; or

(2) total annual emissions allowed under applicable authorizations, including emissions from maintenance, startup, and shutdown activities. Emissions from pending authorizations with administratively complete applications as of the last day of the full first calendar year of operation may be included in the total annual emissions allowed under authorizations.

(b) Adjustments. The baseline amount must be adjusted downward to exclude any emissions that exceeded an emissions limit for rules or regulations in effect by the last day of the one-year period used to determine the baseline amount.

(c) Emissions units. Baseline amounts must include all emissions units located at the major stationary source as of the last day of the one-year period used to determine the baseline amount. When control or ownership of emission units changes during the calendar year, the emissions from those emission units will be attributed to the major stationary source with control or ownership of the emission unit on the last day of the one-year period used to determine the baseline amount.

(d) Calculations. A baseline amount, reported in units of tons per year, must be calculated separately for each pollutant, volatile organic compounds and/or nitrogen oxides for which the source meets the major source applicability requirements of §101.701 of this title (relating to Applicability).

(e) Compliance schedule. Within 90 calendar days of completing the first full year operating as a major stationary source, the major stationary source or Section 185 Account must submit to the executive director a report establishing the baseline amount on a form

published by the executive director.

(f) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and not change except as allowed under this subchapter.

§101.707. Aggregated Baseline Amount.

(a) Aggregation. After determining separate baseline amounts for each pollutant at each major stationary source or Section 185 Account according to the requirements of §101.705 of this title (relating to Baseline Amount) or §101.706 of this title (relating to Baseline Amount for New Major Stationary Sources), an owner or operator of a major stationary source or Section 185 Account may choose to combine baseline amounts as follows:

(1) volatile organic compounds (VOC) emissions into a single aggregated pollutant baseline amount for multiple major stationary sources under common control;

(2) nitrogen oxides (NO_x) emissions into a single aggregated pollutant baseline amount for multiple major stationary sources under common control;

(3) emissions for both VOC and NO_x into a single aggregated pollutant baseline amount for a single major stationary source; and/or

(4) emissions for both VOC and NO_x into a single aggregated pollutant baseline amount for multiple major stationary sources under common control.

(b) Pollutant emissions aggregation. Pollutant emissions in an aggregated amount must have:

(1) the same time period for calculating the baseline amount; and

(2) the same basis of baseline emissions or total annual authorized emissions to calculate the baseline amount.

(c) Section 185 Account reporting. An owner and or operator opting to combine VOC with NO_x emissions and/or combine major stationary sources into one baseline amount must identify all major stationary sources being aggregated under this section.

(d) Fee calculation requirement. The Failure to Attain Fee must be assessed and calculated in the same manner that an owner or operator elects to aggregate under this section.

(e) Compliance schedule. The owner or operator of each major stationary source or Section 185 Account must submit to the executive director a report establishing its aggregated baseline amount on a form published by the executive director.

(1) For major stationary sources or Section 185 Accounts that operated the entire baseline year, the aggregated equivalent alternative baseline amount forms must be submitted by the emissions inventory due date as specified under §101.10 of this title (relating to

Emissions Inventory Requirements) for the fee assessment year, or 120 days after the finding of failure to attain effective date in the Federal Register, whichever is later.

(2) For major stationary sources or Section 185 Account that began operating during or after the baseline year, the aggregated baseline amount forms must be submitted within 90 calendar days of completing the first full year operating as a major stationary source.

(f) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permit data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title or total annual authorized emissions . After review, the baseline amount will be fixed and not be changed except as allowed under this subchapter.

§101.708. Adjustment of Baseline Amount for Major Stationary Sources with Less Than 24 Months of Operation.

(a) Baseline amount. The owner or operator of a major stationary source or Section 185 Account may request adjustment of the baseline amount established under this subchapter if the major stationary source or emissions units at the major stationary source experienced less than 24 months of consecutive operation by December 31 of the baseline year. If the emissions were irregular, cyclical, or otherwise vary significantly from year to year, then the baseline amount may be adjusted as the lower of the following:

(1) total average amount of baseline emissions for the consecutive 24-month period; or

(2) total annual emissions allowed under authorizations applicable to the major stationary source during the first year operating as a major stationary source. Emissions from pending authorizations with administratively complete applications as of the last day of the one-year period used to determine the baseline amount may be included in the total annual emissions allowed under authorizations.

(b) Compliance schedule. Within 90 calendar days of completing 24 consecutive months of operation, the owner or operator of the major stationary source or Section 185 Account must submit to the executive director a request to adjust the baseline amount on a form published by the executive director.

(c) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and not change except as allowed under this subchapter.

(d) Fee assessment. After review, the adjusted baseline amount will be applied starting with the fee assessment year after the review and will continue until the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.709. Adjustment of Baseline Amount for New Construction at a Major Stationary Source

(a) Baseline amount. The owner or operator of a major stationary source or Section 185 Account may request adjustment of their baseline amount established under this subchapter to include emissions limits from new construction of authorized emissions units not included in baseline amounts previously established by the executive director. Adjustments to the baseline amount are limited as follows.

(1) The emissions units must have been authorized by a nonattainment new source review permit, issued under Chapter 116, Subchapter B, Division 5 of this title (relating to Nonattainment Review Permits).

(2) The emissions considered for the adjusted baseline amount for new emissions units are restricted to emissions units without a previously established baseline amount.

(b) Compliance schedule. Within 90 calendar days of completed construction of the new emissions units, the owner or operator of the major stationary source or Section 185 Account must submit to the executive director a request to adjust the baseline amount on a form published by the executive director.

(c) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and will not change except as allowed under this subchapter.

(d) Fee assessment. After review, the adjusted baseline amount will be applied starting with the fee assessment year after the review and will continue until the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.710. Adjustment of Baseline Amount for Ownership Transfers.

(a) Baseline amount. The owner or operator of a major stationary source or Section 185 Account may request adjustment of their baseline amount established under this subchapter if ownership and operation of emissions units are no longer under common ownership or control. Adjustments to the baseline amount are limited as follows:

(1) The baseline amount, as calculated and reported for all equipment no longer under common ownership or control, will be transferred from the original reporting major stationary source or Section 185 Account to the new major stationary source or Section 185 Account without modification to the reported amount; and

(2) The baseline amount for remaining equipment at the originating and recipient major stationary source or Section 185 Account will not be adjusted based on a change of ownership or control of emissions units to or from a major stationary source or Section 185 Account.

(b) Adjustment qualification. To qualify for this baseline amount adjustment, the ownership transfer of the emissions units must take place between major stationary sources of the same pollutant or aggregated pollutants, volatile organic compounds and/or nitrogen oxides located within the same nonattainment area.

(c) Compliance schedule. Within 90 calendar days of the effective date of a change of ownership or control of emissions units, the owner or operator of each major stationary source or Section 185 Account affected by the change in ownership or control of emissions units must submit to the executive director a request to adjust the baseline amount on a form published by the executive director.

(d) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or air permitting data systems, the executive director may direct that the baseline amount be based on the lower of reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and will not change except as allowed under this subchapter.

(e) Fee assessment. After review, the adjusted baseline amount will be applied starting with the fee assessment year after the review and will continue until the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.711. Adjustment of Baseline Amount for Final Emissions Inventory Data

(a) Baseline amounts. Baseline amounts established under this subchapter may be adjusted based on final quality assured emissions inventory data.

(b) Compliance schedule. Within 90 calendar days of receipt of final quality assured emissions inventory data or by March 31 of the calendar year immediately following the

emissions inventory reporting year, whichever comes first, the owner or operator of each major stationary source or Section 185 Account must submit to the executive director a request to adjust the baseline amount on a form published by the executive director.

(c) Review. Where the baseline amount does not align with information recorded in either the emissions inventory database or the air permitting data systems, the executive director may direct that the baseline amount be based on the lower of the reported emissions under §101.10 of this title (relating to Emissions Inventory Requirements) or total annual authorized emissions. After review, the baseline amount will be fixed and will not change except as allowed under this subchapter.

(d) Fee assessment. After review, the adjusted baseline amount will be applied starting with the fee assessment year after the review and will continue until the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.712. Failure to Establish a Baseline Amount.

The executive director will determine baseline amounts for any major stationary source subject to §101.701 of this title (relating to Applicability) that fails to submit a baseline amount by the due date specified by the commission as follows:

(1) If information is available to determine a baseline amount for each pollutant for which the source meets major source applicability requirements, the executive director will determine the baseline amount to be the lower of:

(A) baseline emissions reported under §101.10 of this title (relating to Emissions Inventory Requirements); or

(B) total annual emissions allowed under authorizations, including authorized emissions from maintenance, startup, and shutdown activities.

(2) If no emissions inventory information required to determine baseline amount information is available, the executive director will establish the baseline amount as:

(A) 12.5 tons of volatile organic compounds (VOC) emissions for major stationary sources of VOC emissions;

(B) 12.5 tons of nitrogen oxides (NO_x) emissions for major stationary sources of NO_x emissions; or

(C) 12.5 tons of VOC emissions and 12.5 tons of NO_x emissions for major stationary sources of VOC and NO_x emissions.

(3) The executive director will not aggregate baseline amounts under §101.707 of this title (relating to Aggregated Baseline Amount) or adjust baseline amounts as provided in this subchapter to determine a baseline amount under this section.

(4) A major stationary source will pay the Failure to Attain Fee according to §101.714 of this title (relating to Failure to Attain Fee Payment).

(5) If the major stationary source submits a complete and verifiable emissions inventory according to §101.10 of this title, the major stationary source may then submit a baseline amount to the executive director on a form published by the executive director.

(6) After the executive director finalizes the baseline amount based on demonstrated compliance with the criteria in this subchapter, the baseline amount will be applied starting with the fee assessment year after finalization and will continue until the Failure to Attain Fee no longer applies to the area as specified under §101.718 of this title (relating to Cessation of Program). No refunds or credits will be applied to fees previously paid.

§101.713. Failure to Attain Fee Assessment.

(a) Pollutant applicability. The executive director will annually assess the Failure to Attain Fee for each pollutant, volatile organic compounds (VOC), nitrogen oxides (NO_x), or both, for which the major stationary source or Section 185 Account meets the requirements of §101.701 of this title (relating to Applicability) at any time during a calendar year.

(b) Aggregation. The fee will be assessed and calculated using the same Failure to Attain Fee determination method used under this subchapter. Actual VOC or NO_x emissions may be kept separate or aggregated together. A single pollutant may be aggregated across multiple major stationary sources, or VOC and NO_x emissions may both be aggregated together across multiple major stationary sources. Aggregation as described under §101.707 of this title (relating to Aggregated Baseline Amount) is limited to emissions from:

(1) major stationary sources that aggregated VOC baseline amounts;

(2) major stationary sources that aggregated NO_x baseline amounts; or

(3) major stationary sources that aggregated VOC with NO_x baseline amounts.

(c) Assessment. The owner or operator of each major stationary source to which this rule applies must annually pay the Failure to Attain Fee to the commission calculated in accordance with either subsection (d) or (e) and subsection (f) of this section. The Failure to Attain Fee will be assessed on actual emissions of VOC and/or NO_x as recorded in the emissions inventory under §101.10 of this title (relating to Emissions Inventory Requirements), that exceed 80% of the pollutant baseline amount, rounded up to the nearest whole number.

(d) Fee assessment for separate pollutants. The Failure to Attain Fee from major stationary sources that did not aggregate baseline amounts under §101.707 of this title will remain separate and due from each major stationary source or Section 185 Account for each pollutant for which the source meets the major source applicability requirements. The fee will be calculated separately by the formula in subsection (f) of this section.

(e) Fee assessment for aggregated pollutants. The Failure to Attain Fee will be calculated in accordance with subsection (f) of this section and the method used for an aggregated baseline amount determination as described under §101.707(a) of this title.

(1) If VOC emissions are aggregated, VOC emissions from all major stationary sources in the Section 185 Account must be used for aggregated actual emissions and the aggregated baseline emissions.

(2) If NO_x emissions are aggregated, NO_x emissions from all major stationary sources in the Section 185 Account must be used for the aggregated actual and aggregated baseline emissions.

(3) If VOC emissions are aggregated with NO_x emissions at one major stationary source, VOC and NO_x emissions must be used for the aggregated actual and aggregated baseline emissions. If VOC emissions are aggregated with NO_x emissions across multiple major stationary sources, VOC and NO_x emissions from each major stationary source in the Section 185 Account must be used for the aggregated actual and aggregated baseline emissions.

(f) Fee calculations. The fee will be calculated for VOC, NO_x, or both pollutants' emissions, as follows.

Figure: 30 TAC §101.713(f)

$$\text{§185Fee} = \$200\left[\left(\frac{2}{3}\times Part70x\right)+\left(\frac{1}{3}\times Part70y\right)\right]\times[(Actual-(0.8\times BA)]$$

Definitions:

Part70x = The Code of Federal Regulations (CFR) Part 70 fee published by the EPA for the 12 months that includes the fiscal year for the calendar year that a fee is being assessed. This value represents the base value for January through August portion of the annual fee.

Part70y = The CFR Part 70 fee published by the EPA for the 12 months that includes the fiscal year following the calendar year that a fee is being assessed. This value represents the base value for September through December portion of the annual fee.

Actual = All quantifiable emissions of VOC and/or NO_x from the major stationary source or Section 185 Account; as recorded in the annual emissions inventory for the fee assessment year. Actual emissions include all authorized and unauthorized emissions in units of tons per year. Pollutants and/or sites aggregated under §101.707 of this title will be combined for fee assessment in the same manner.

BA = Baseline amount in tons per year from a major stationary source or Section 185 Account as calculated under this subchapter.

§185Fee = The Failure to Attain Fee for each individual major stationary source or Section 185 Account calculated by the executive director based on actual emissions recorded in the inventory under §101.10 of this title (relating to Emissions Inventory Requirements).

(g) Enforcement. Failure to submit an emissions inventory according to the provisions of §101.10 of this title (relating to Emissions Inventory Requirements) to circumvent assessment of the Failure to Attain Fee is also subject to enforcement account under Texas Water Code (TWC), Chapter 7.

§101.714. Failure to Attain Fee Payment.

(a) Fee timeframe. The Failure to Attain Fee is assessed, invoiced, and paid for each pollutant for which the source is major, volatile organic compounds and/or nitrogen oxides,

starting the calendar year following the baseline year and continuing each year until the area is no longer subject to the Failure to Attain Fee as described under §101.718 of this title (relating to Cessation of Program).

(b) Payment. Payment of Failure to Attain Fees required by this subchapter must be paid by check, certified check, electronic funds transfer, or money order made payable to the Texas Commission on Environmental Quality (TCEQ) and sent to the TCEQ address printed on the billing statement.

(c) Fee payment due date. The Failure to Attain Fee payment is due by the due date specified on the invoice. The invoice due date will be a minimum of 30 days after the invoice mail date.

(d) Nonpayment of fees. Each emissions Failure to Attain Fee payment must be paid at the time and in the manner and amount provided by this subsection. Failure to pay the full Failure to Attain Fee by the due date will result in enforcement action under Texas Water Code (TWC), §7.178.

(e) Late payments. The agency will impose interest and penalties on owners or operators of a major stationary source or Section 185 Account who fail to make payment of emissions fees when due in accordance with Chapter 12 of this title (relating to Payment of Fees).

§101.715. Eligibility for Other Failure to Attain Fee Fulfillment Options.

(a) Alternative fulfillment options. Notwithstanding any requirement in this subchapter, the owner or operator of a major stationary source or Section 185 Account required to pay a

Failure to Attain Fee may submit a request to the executive director to partially or completely fulfill the Failure to Attain Fee in compliance with §101.716 (relating to Relinquishing Credits to Fulfill a Failure to Attain Fee and §101.717 of this title (relating to Using a Supplemental Environmental Project to Fulfill a Failure to Attain Fee).

(b) Unfulfilled portions. If a Failure to Attain Fee cannot be completely fulfilled using alternate fulfillment options, then the unfulfilled portion of the Failure to Attain Fee is required to be calculated, assessed, and paid according to the provisions of this subchapter.

(c) Reporting. The owner or operator of a major stationary source or Section 185 Account must inform the executive director if they choose an alternative fulfillment option for all or a portion of the Failure to Attain Fee as described in §101.716 and §101.717 of this title. The request must be submitted on a form specified by the executive director and include a list of the emissions in tons of volatile organic compounds and/or nitrogen oxides requested from alternative fulfillment options, payment, or combination to cover the entire Failure to Attain Fee.

(d) Compliance schedule. No later than emissions inventory due date as specified under §101.10 of this title (relating to Emissions Inventory Requirements) for the first fee assessment year and continuing annually, the owner or operator of a major stationary source or Section 185 Account must submit the request specified in subsection (c) and ensure the following conditions are met:

(1) all emissions credits under §101.716 of this title must be approved, exercised, or otherwise completed; and

(2) all Supplemental Environmental Projects under §101.717 of this title must be approved and funded.

(e) If the executive director does not receive the notification request to use alternative fulfillment options for all or a portion of the Failure to Attain Fee or the alternate fulfillment options are not approved and funded, exercised, or otherwise completed as required by this subsection, the Failure to Attain Fee payment will be due in full as described under §101.714 of this title (relating to Failure to Attain Fee Payment).

§101.716. Relinquishing Credits to Fulfill a Failure to Attain Fee.

(a) The owner or operator of a major stationary source or Section 185 Account subject to this subchapter may submit a request to partially or completely fulfill the Failure to Attain Fee by substituting emissions reductions, on a volatile organic compounds-or nitrogen oxides-specific basis, in an amount equivalent to the tons on which the Failure to Attain Fee has been assessed by relinquishing an equivalent amount of any combination of:

(1) emissions reduction credits;

(2) discrete emissions reduction credits;

(3) current or banked Highly-Reactive Volatile Organic Compound Emissions Cap and Trade program allowances; and/or

(4) current or banked Mass Emissions Cap and Trade program allowances.

(b) The use of the provisions of this section to fulfill a Failure to Attain Fee is subject to review by the executive director.

§101.717. Using a Supplemental Environmental Project to Fulfill a Failure to Attain Fee.

(a) The owner or operator of a major stationary source or Section 185 Account subject to this subchapter may submit a request to partially or completely fulfill the Failure to Attain Fee by contributing to a Supplemental Environmental Project (SEP), on volatile organic compounds (VOC) or nitrogen oxides (NO_x)-specific basis by either:

(1) an amount equivalent to the tons on which the Failure to Attain Fee has been assessed; or

(2) an amount equivalent to the Failure to Attain Fee amount assessed.

(b) The SEP must directly reduce the amount of VOC and/or NO_x emissions in the 2008 eight-hour ozone National Ambient Air Quality Standard nonattainment area.

(c) The SEP must be enforceable through an Agreed Order or other enforceable document.

(d) The use of SEP funds must be on a dollar-for-dollar basis and will not be discounted due to the passage of time. Credit from SEP funds may be accumulated from year to year, and if a surplus exists in any given year, the funds may be used to offset the calculated Failure to Attain Fee as needed.

(e) Funds in a SEP used to offset an administrative penalty cannot be used to offset a Failure to Attain Fee.

(f) The use of a SEP to fulfill a Failure to Attain Fee is subject to approval by the executive director.

§101.718. Cessation of Program.

(a) The Failure to Attain Fee will continue to apply until one of the following actions is final:

(1) the effective date of redesignation of the area classified as severe or extreme under the 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS or standard) to attainment by the U.S. Environmental Protection Agency (EPA);

(2) any final action or final rulemaking by EPA to end the Failure to Attain fee; or

(3) finding of attainment by EPA.

(b) Notwithstanding subsection (a) of this section, the Failure to Attain Fee will be calculated but not invoiced, and the fee collection may be placed in abeyance by the executive director if three consecutive years of quality-assured data resulting in a design value that did not exceed the 2008 eight-hour ozone National Ambient Air Quality Standard (NAAQS), or a demonstration indicating that the area would have attained by the attainment date but for emissions emanating from outside the United States, are submitted to EPA. The design value may exclude days submitted to EPA by the executive director that exceeded the standard

because of exceptional events. Fee collection will remain in abeyance until EPA takes final action on its review of the certified monitoring data and any demonstration(s).